DOCUMENT RESUME

ED 456 564 EA 031 296

AUTHOR	Sendor, Benjamin B.
TITLE	A Legal Guide to Religion and Public Education. Second Edition. Monograph Series, No. 59.
INSTITUTION	Education Law Association, Dayton, OH.
ISBN	ISBN-1-56534-094-9
PUB DATE	1997-00-00
NOTE	98p.; For first edition (1988), see ED 298 665.
AVAILABLE FROM	Education Law Association, 300 College Park, Mail Drop 0528, Dayton, OH 45469 ($20). Tel: 937-229-3589; Fax: 937-229-3845; e-mail: ela@udayton.edu.
PUB TYPE	Books (010) -- Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Civil Rights Legislation; Constitutional Law; *Court Litigation; Elementary Secondary Education; Federal Courts; *Freedom of Speech; Law Related Education; Legal Problems; *Public Education; Religion Studies; Religious Cultural Groups; *Religious Discrimination; Religious Holidays; *School Law; School Prayer; *State Church Separation
IDENTIFIERS	First Amendment; Religious Freedom; Supreme Court

ABSTRACT

This book, an update of the 1988 edition, gives readers a basic grasp of the general legal principles controlling the role of religion in public education with the goal of applying those principles to typical church/state issues. Chapter 1 offers the background of general legal principles needed to understand specific church/state issues. Chapter 2 examines student religious activities, including prayer, religious clubs, display of religious symbols, holiday observances, and distribution of religious literature. Chapter 3 considers religious objections to secular activities, such as pledging allegiance to the flag. Chapter 4 helps to distinguish between courses about religion and those disseminating religious beliefs, and offers advice on teaching evolution, sex education, and other topics frequently of concern to religious groups. Chapter 5 surveys religious activities of school personnel, such as apparel and religious leave. Chapter 6 explores other religious activity on school grounds, such as use of facilities by outside groups. In every chapter the effect of specific legal decisions is made clear. Appendices include the Equal Access Act and a map of the geographic areas of federal judicial circuits, to show the area in which a federal appellate court decision applies. There is a general index and an index of cases. (RKJ)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 456 564

A Legal Guide to Religion and Public Education

Second Edition

Benjamin B. Sendor

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

EA 031296

Education Law Association

No. 59 in the Monograph Series

BEST COPY AVAILABLE

2

A Legal Guide to Religion and Public Education

Second Edition

Benjamin B. Sendor

DISCLAIMER

The Education Law Association (ELA), formerly the National Organization on Legal Problems of Education, is a private, nonadvocacy, and nonprofit association of educators and attorneys. The opinions expressed in this publication are those of the author and do not represent official views of the Association.

Copyright © 1997
EDUCATION LAW ASSOCIATION
ISBN 1-56534-094-9

Published by

EDUCATION LAW ASSOCIATION
300 College Park
Dayton, Ohio 45469-2280

About the Author

Benjamin B. Sendor received his J.D. degree from Harvard Law School. He is an Assistant Appellate Defender in the Office of the Appellate Defender of North Carolina. Sendor has written numerous articles about church/state issues in public education and is the legal columnist for *The American School Board Journal*.

Table of Contents

Introduction 1

Chapter 1 General Legal Principles 3

Chapter 2 Religious Activity by Students 9
- A. School Prayer 9
  - 1. Officially Sanctioned Prayer 9
  - 2. Private Prayer 10
  - 3. Moment of Silence 10
- B. Extracurricular Student Religious Clubs 12
  - 1. Early Cases 12
  - 2. The Equal Access Act 13
  - 3. The *Mergens* Case 17
  - 4. Implications: Student Religious Clubs After *Mergens* 19
  - 5. Student Religious Clubs Under State Constitutions 22
  - 6. Religious Clubs in Elementary Schools 23
- C. Prayers at Special Occasions 24
  - 1. Graduation 24
  - 2. Baccalaureate Services 31
  - 3. Athletic and Other Extracurricular Events 33
- D. Display of Religious Symbols 35
- E. Holiday Observances 39
- F. Distribution of Bibles and Other Religious Literature 40
- G. Conclusion 42

Chapter 3 Religious Objections to Secular Activities 45

Chapter 4 Religion and the Curriculum 47
- A. Courses or Course Segments About Religion 47
- B. Religious Objections to Secular Courses 56
  - 1. Evolution and Creationism 56
  - 2. Sex Education 62
- C. Religious Objections to Secular Instructional Materials and Methods 64
- D. Conclusion 72

Chapter
5 RELIGIOUS ACTIVITY BY PERSONNEL 73
A. Prayer or Private Study 73
B. Discussion of Religion with Students 74
C. Wearing Religious Apparel or Religious Symbols ... 76
D. Leave for Religious Reasons 79

Chapter
6 OTHER RELIGIOUS ACTIVITIES ON SCHOOL GROUNDS 83
A. Prayer at School Board Meetings 83
B. Use of School Facilities by Outside Groups 83

APPENDICES
I. Title VIII, The Equal Access Act 87
II. Map of the Thirteen Judicial Circuits 89

STATUTES CITED 91

TABLE OF CASES 91

INDEX 95

INTRODUCTION

Few questions engage public emotional chords as strongly as the role of religion in the public schools. When questions about religion arise, school officials often find themselves working in an unwelcome spotlight, trying to satisfy several masters–public sentiment, legal duty, and their own beliefs. This book is designed to help officials in America's public schools deal with this difficult matter by introducing them to the law governing church/state issues in public education. It does not seek to answer every question that might arise about religion in the schools. Instead, its purpose is to give readers a basic grasp of the general legal principles controlling the role of religion in public education, to apply those principles to typical church/state issues in the schools, and to equip readers to address other specific issues as they arise.

This monograph cannot replace the sound advice of an experienced school board attorney on thorny legal questions. I hope, however, that it succeeds in its goal of giving school officials sufficient understanding and information to enable them to avoid common church/state problems through prudent policy development and implementation and to work effectively with attorneys when necessary.

This monograph includes, as an appendix, a map of the United States showing the geographic areas comprising the thirteen federal judicial circuits. The map should help readers determine which federal appellate court decisions govern the law in their areas.

This is the second edition of this book. It is an update of the monograph first published by NOLPE in 1988. A virtually identical version of this edition was published as a chapter in *Education Law in North Carolina* (Chapel Hill: Principals' Executive Program, The University of North Carolina at Chapel Hill, 1996) and is reprinted by permission of the Principals' Executive Program. Minor changes were made for this publication. I am grateful for the helpful editorial assistance of Robert Phay, Janine Murphy, Margaret Taylor, and Dan Lewandowski, and for the assistance of the publications production staff of the Principals' Executive Program.

CHAPTER 1

General Legal Principles

The very first clauses of the First Amendment set forth the fundamental legal principles regulating the relation between government and religion. About that relation, the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This language contains two distinct provisions restricting government authority over religion: the Establishment Clause and the Free Exercise Clause. The Fourteenth Amendment, as interpreted by the United States Supreme Court, extends these limits on governmental power to state and local governments, including school administrative units, their officials, and their employees.[1]

The purpose of the Free Exercise Clause is to prevent the government from impairing the liberty of individuals to exercise their religious faith. The clause governs conflicts between religious faith and government actions that through coercion make it more difficult to hold the beliefs and engage in the practices of such faith.[2] It provides absolute protection for freedom to hold religious beliefs, but only qualified protection for freedom to engage in religious activities.[3]

Until 1990, courts throughout the nation followed a uniform, general approach to resolving disputes over government interference with religious faith. Courts would weigh the strength of individuals' interest in exercising the beliefs or practices in question, the strength of the government's interest in a policy that limits the exercise of faith, and the degree of burden imposed by the limitation.[4] If a governmental policy interfered with individuals' freedom to exercise their faith, the government agency would have to show first that its interest in enforcing the policy was sufficiently compelling to override individuals' religious rights

---

[1] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215-16 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberties embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[2] Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).

[3] Sherbert v. Verner, 374 U.S. 398, 410 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940).

[4] *Yoder*, 406 U.S. 205, 215.

and then that the policy represented the least restrictive way of fulfilling the government's interest.[5]

However, in its 1990 decision in *Employment Division v. Smith*,[6] the Supreme Court of the United States departed from this well-settled analysis of the Free Exercise Clause. The Court held that a generally applicable law that has the coincidental effect of burdening religious practice but does not expressly target religious practice or burden other constitutional rights need not be justified by a compelling governmental interest. The Court's decision in *Smith* generated widespread criticism about the Court's weakening of religious freedom. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA).[7] This act effectively restored the compelling-interest test by creating a statutory right to the free exercise of religion, mandating the use of the compelling-interest test in enforcing that new right, and decreeing its application to all cases in which government action substantially burdens religious beliefs or practices. The new statute did not overrule *Smith*, since Congress cannot overrule the Supreme Court's interpretation of the Constitution, but it created a statutory right to the free exercise of religion that is similar to but stronger than the constitutional right. The statute provides that government agencies may not "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless (1) the agency imposes the burden to advance a compelling governmental interest, and (2) the agency's imposition of the burden is "the least restrictive means of furthering that compelling governmental interest."[8]

The purpose of the Establishment Clause is to enforce government neutrality concerning religion by separating the realms of church and state. The clause shapes the relation between government and religion according to these principles: "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious

---

[5] Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963). As Justice O'Connor observed, the Supreme Court also articulated other, similar analyses of the Free Exercise Clause before 1990. *See* Goldman v. Weinberger, 475 U.S. 503, 529, 530 (1986) (O'Connor, J., dissenting).

[6] 494 U.S. 872 (1990).

[7] 42 U.S.C.A. § 2000bb (West 1994).

[8] *Id.* at 2000bb-1. The Religious Freedom Restoration Act is a federal statute, not an amendment to the United States Constitution. Cases involving challenges to the power of Congress to enact this statute are now pending in the federal courts. One such case is now pending in the Supreme Court: City of Boerne v. Flores, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, ___ U.S. ___, No. 95-2074 (Oct. 15, 1996).

theory against another. . . ."[9] In other words, the First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion.

The Supreme Court has developed a three-part test (known as the *Lemon* test from its origin in *Lemon v. Kurtzman*[10]) for judging challenges to government acts on the basis of the Establishment Clause. To pass the test, any governmental act that bears on religion (1) must reflect a clearly secular purpose; (2) may neither advance nor inhibit religion as its primary effect; (3) and must avoid excessive government entanglement with religion.[11] The act must pass all three parts of the test in order to comply with the Establishment Clause.[12] Although the test is not a rigid, mechanical procedure that yields predictable and unassailable answers in concrete cases,[13] school officials should understand it because the test guides courts in their review of religious activities in public schools.

In recent years, the Supreme Court has denied repeated challenges to the *Lemon* test, though sometimes by the narrowest of margins. In *Lee v. Weisman*,[14] a case involving graduation prayer, the majority opinion expressly declined to decide whether to reaffirm or discard the *Lemon* test. Instead, the majority ruled on graduation prayer without having to apply the *Lemon* test. Recent changes in the composition of the Supreme Court leave the future viability of *Lemon* unsettled. In the meantime, though, the *Lemon* test still stands, and lower courts and school officials must continue to use it to analyze church/state issues in the public schools.

The most important recent development concerning the *Lemon* test is the Supreme Court's adoption of Justice Sandra Day O'Connor's interpretation of it. In 1984, in *Lynch v. Donnelly*,[15] she suggested that the issue in the second part of the test–that a government act may neither advance nor inhibit religion as its primary effect–is whether a challenged policy or practice of a government agency *endorses* religious beliefs or practices. Following her lead, a majority of the Court in the 1989 decision in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*[16] held that to determine whether governmental policy or conduct endorses religious beliefs or practices, it is necessary to consider (1) whether the government officials involved understand that the

---

[9] Epperson v. Arkansas, 393 U.S. 97, 103-4 (1968).
[10] 403 U.S. 602 (1971).
[11] *Id.* at 612-13.
[12] *Id.*
[13] Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984).
[14] 505 U.S. 577 (1992).
[15] 465 U.S. 668, 692 (1984).
[16] 492 U.S. 573, 595-96 (1989).

policy or conduct endorses religion and (2) whether an observer would understand it as endorsing religious beliefs or practices.[17]

Thus before implementing a public school policy that involves religion, school officials should bear these requirements in mind and consider whether an ordinary student might construe the policy as endorsing religious beliefs or practices.

Constitutional debates over the role of religion in the public school curriculum often involve a complex interplay between the Free Exercise and Establishment Clauses and RFRA. As explained above, each clause serves a different purpose. The goal of the Free Exercise Clause and RFRA is to keep religious faith voluntary, free from government coercion, while the goal of the Establishment Clause is to prevent excessive government involvement in religion. This distinction becomes important in analyzing controversies over religious activity in public schools. The Supreme Court has stressed that a provision that makes a government-supported religious practice optional might save the practice from a challenge under the Free Exercise Clause but not from a challenge under the Establishment Clause.[18] Thus a student's voluntary participation in public school religious activity would not violate the student's rights under the Free Exercise Clause or RFRA. But the voluntary nature of his or her participation is irrelevant to the Establishment Clause, which concerns what government (acting in the form of the school administration) does. Even if all students in a class and their parents approved of a religious activity in school, the activity still could violate the Establishment Clause if it entailed excessive government involvement in religion. The result is different with respect to religious objections to a government-supported secular practice. If the activity is voluntary, its optional nature would save it from a challenge under the Free Exercise Clause or RFRA, and its secular nature would save it from a challenge under the Establishment Clause.

Before we turn to specific questions about religious activity in public school, a brief introduction to the Free Speech Clause of the First

---

[17] *Id.*; Lynch v. Donnelly, 465 U.S. 668, 692 (1984). In two 1995 cases involving the Establishment Clause, the Supreme Court managed to avoid debating the status of the *Lemon* test and rendered decisions without relying on *Lemon*. Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995); Capital Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995). However, in *Pinette* the Court relied on the endorsement analysis of part of the *Lemon* test. In *Rosenberger* it clearly relied heavily on all three parts of *Lemon* without expressly identifying *Lemon* as its authority. The Court's reliance on *Lemon*, without identifying that case as the source of its authority, suggests that *Lemon* in fact remains viable, at least as a set of guidelines or an analysis, though perhaps not as a rigid test.

[18] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962).

Amendment is necessary. A quick overview of the Free Speech Clause will be helpful here, since a number of issues concerning religion in the public schools (e.g., extracurricular student religion clubs, distribution of written religious material by students, and religious activity of school employees and outsiders on campus) hinge on the application of this provision, as well as on the Establishment and Free Exercise Clauses of the First Amendment and RFRA.

The Free Speech Clause prohibits the federal government from abridging freedom of speech; under the Fourteenth Amendment, the Free Speech Clause also limits the power of state and local governments–including local school boards and their employees–over speech. The legal controversies that arise over speech, or expression, in public schools fall within the category of government regulation of expression on public property, such as public school campuses. The United States Supreme Court has identified four types of forums for expressive activity on public property. (1) In *traditional public forums* (such as streets, parks, and sidewalks), the Free Speech Clause prohibits government agencies from regulating the content of speech unless such regulation is necessary to serve a compelling government interest, but agencies may make reasonable regulations about the time, place, and manner of expression. (2) In *traditional nonpublic forums* (such as schools, hospitals, military bases, and prisons), government agencies may prohibit all outside people and groups from engaging in expressive activity and may adopt and enforce reasonable regulations about the content of expressive activity in order to preserve the property for its intended use. (3) A *designated public forum* is a traditional nonpublic forum (schools, etc.) that a government agency has opened for expressive activity, either by official policy or by unofficial traditional practice. Once a government agency has converted a traditional nonpublic forum into a designated public forum, the same rules that limit government regulation of expressive activity in a traditional public forum also apply to the regulation of expression in the designated public forum. For example, when a school board opens an auditorium for community activities such as plays, speeches, and concerts, it changes the characterization of that venue from a traditional nonpublic forum to a designated public forum. (4) A *limited public forum* is a hybrid category; it is a nonpublic forum that a government agency has decided to open for certain types of uses or users. An agency can transform a nonpublic forum into a limited public forum as long as the restrictions on uses and users are reasonable and do not discriminate either for or against uses or users on the basis of the content of the views to be expressed. For example, a school board can open up a high school auditorium for plays and concerts produced and performed by outsiders, but it may not then

bar *some* concerts or plays on the basis of the nature of either the performances or the performers, except when such a prohibition is necessary to serve a compelling government interest.[19]

With these fundamental principles concerning the First Amendment law governing religion and expressive activity in mind, we can consider the constitutional dimensions of religious activity in the public schools.

---

[19] On forum analysis, *see generally* Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516-17 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46, 54-55 (1983); Widmar v. Vincent, 454 U.S. 263, 267-70 (1981); Grayned v. City of Rockford, 408 U.S. 104, 115-18 (1972).

CHAPTER 2

RELIGIOUS ACTIVITY BY STUDENTS

A. School Prayer

1. Officially Sanctioned Prayer

The United States Supreme Court decisively grappled with the constitutionality of officially sanctioned, audible prayer and Bible reading in public school classrooms in 1962 in *Engel v. Vitale*[20] and again the following year in *School District of Abington Township v. Schempp*.[21] In *Engel* the Court held that the New York public schools' daily classroom recitation of a nondenominational prayer composed by the state government violated the Establishment Clause despite a provision that permitted students to be excused from prayer upon parental request. In *Schempp* the Court held unconstitutional, under the Establishment Clause, a Pennsylvania statute requiring that at least ten Bible verses be read aloud to students without comment at the start of each school day and also a Baltimore policy requiring the recitation of either the Lord's Prayer or a chapter of the Bible without comment at the start of the school day. In both cases the Court found that the laws, policies, and practices at issue violated the Establishment Clause because they had religious purposes, and they advanced the religious beliefs contained in the Bible and in the challenged prayers.[22] The Court explained that while an effective excusal policy might prevent a religious practice from violating the Free Exercise Clause, it would not save the activity from violating the Establishment Clause.

Since the *Engel* and *Schempp* decisions, courts across the nation have reviewed statutes and policies that provide for school prayer but also provide greater voluntariness than the policies rejected in those cases. For example, the Supreme Judicial Court of Massachusetts reviewed a statute requiring teachers to announce at the beginning of each school day a period of prayer to be led by a student volunteer; the law contained an excusal policy.[23] The United States Court of Appeals for the Fifth Circuit considered a Louisiana statute authorizing local school boards to permit school officials to allow each classroom teacher to ask at the start

---

[20] 370 U.S. 421 (1962).

[21] 374 U.S. 203 (1963).

[22] Although the Supreme Court did not fully articulate the three-part test until 1971 in *Lemon*, its opinions in *Engel* and *Schempp* rested on grounds that would later become the first two parts of the *Lemon* test. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[23] Kent v. Commissioner of Educ., 380 Mass. 235, 402 N.E.2d 1340 (1980).

of the school day whether any student wished to offer a prayer.[24] If no student volunteered, the statute permitted the teacher to do so. It too had an excusal provision. The Ninth Circuit Court of Appeals reviewed an Arizona high school's policy that permitted student council officers to conduct student assemblies in the auditorium during the school day and to begin the assemblies with a prayer.[25] School officials coordinated class schedules to accommodate the assemblies. Attendance at the assemblies was optional; students who did not attend were assigned to study hall.

In all three cases, the courts declared the challenged practices unconstitutional under the Establishment Clause, finding that the activities failed all three parts of the *Lemon* test. They expressly rejected the argument that the optional nature of the practices rendered the practices constitutional. Heeding the Supreme Court's lesson in *Engel* and *Schempp*, the courts explained that the voluntary nature of a religious practice does not shield the activity from violating the Establishment Clause.

2. Private Prayer

When it considered Alabama's moment-of-silence law (see the next section) in 1985, the United States Supreme Court made an important point, one often lost in the heated debate over school prayer: Courts have not banished prayer from the schools, as some critics have charged.[26] Courts have forbidden only officially *sanctioned* or officially *sponsored* prayer. The Establishment Clause does not prohibit students from praying silently at any time or audibly on their own free time during the school day (such as during lunch or recess) if the prayer is totally voluntary and unofficial and the student does not interfere with teachers, official school activities, or other students.[27] Students on their own time during the school day have as much a right to pray privately as to ponder a coming test or last night's baseball scores.

3. Moment of Silence

After the *Schempp* decision, the question arose whether an officially sanctioned moment of silence would be constitutional under the Establishment Clause. Most of the courts that considered the practice ruled

---

[24] Karen B. v. Treen, 653 F.2d 897, 899 (5th Cir. 1981).

[25] Collins v. Chandler United Sch. Dist., 644 F.2d 759, 760 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981).

[26] Wallace v. Jaffree, 472 U.S. 38, 58 nn.45, 59 (1985).

[27] *Id.* at 59. *See also id.* at 67 (O'Connor, J., concurring).

that it was unconstitutional.[28] The Supreme Court finally addressed the question in 1985 in *Wallace v. Jaffree*.[29] Although the Court struck down the Alabama moment-of-silence statute at issue in that case, it indicated that a properly worded statute (or regulation) could comply with the Establishment Clause.

The statute in question authorized public school teachers in all grades to announce a one-minute period of silence for "meditation or voluntary prayer." The legislative history showed that the sole purpose of the law's sponsor was to return state-sanctioned prayer to the public schools. In addition, the Court observed that an earlier statute directed teachers of all grades through the sixth to enforce a one-minute period of silence for "meditation." It concluded that by adding the words "or voluntary prayer" in the later statute, the legislature signaled its intent to identify prayer as a favored way for students to use the period of silence. The Court ruled that such an endorsement of prayer violated the Establishment Clause.

Although it rejected the Alabama statute, the Court indicated that a moment-of-silence statute adopted for at least some genuine secular purpose (such as beginning the school day with fitting solemnity) and worded in a way that would not favor prayer would not offend the Establishment Clause. For example, a statute authorizing a period of "meditation" would be constitutional. Such a statute would permit students to use the period for any type of silent reflection they chose to engage in, including prayer, without suggesting or directing them to choose a particular type of reflection. A student could pray or think about any other topic.[30] North Carolina, for example, has such a statute:[31]

> To afford students and teachers a moment of quiet reflection at the beginning of each day in the public schools, to create a boundary between school time and nonschool time, and to set a tone of decorum in the classroom that

---

[28] *Compare* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983); Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 103 (D.N.M. 1983); and Beck v. McElrath, 548 F. Supp. 161 (M.D. Tenn. 1982) (striking down statutes requiring or authorizing a daily moment of silence), *with* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (three-judge court) (upholding a statute and local school board resolution requiring a daily moment of silence).

[29] 472 U.S. 38, 41, 42 (1985).

[30] *Id.* at 59. In May v. Cooperman, the Third Circuit Court of Appeals struck down a New Jersey statute requiring principals and teachers to permit a one-minute period of silence at the beginning of each school day "to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection." 780 F.2d 240, 241 (3d Cir. 1985), *appeal dismissed*, Karcher v. May, 484 U.S. 72 (1987). The court found that the statute did not improperly advance or inhibit religion as its primary effect and did not unduly entangle school authorities in religious affairs. But it upheld a lower court finding that the legislative history of the statute showed that it had an unlawfully religious purpose. *Id.* at 253.

[31] N.C. GEN. STAT. §§ 115C-47(29), 47(29b).

> will be conducive to discipline and learning, each local board of education may adopt a policy to authorize the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.
>
> No local board of education shall have a policy of denying, or that effectively prevents participation in, prayer in public schools by individuals on a voluntary basis, except when necessary to maintain order and discipline. No local board of education shall encourage or require any person to participate in prayer or influence the form or content of any prayer in public schools. This subdivision shall not be construed to direct any local board of education to take any action in violation of the Constitutions of North Carolina or the United States.

B. Extracurricular Student Religious Clubs

1. Early Cases

Some students have sought to form extracurricular clubs in order to engage in religious activities, including prayer, at school. The constitutionality of such clubs has been a thorny question for courts, Congress, and school officials for many years. The main argument voiced by proponents of such clubs is that a school official's decision to permit students to form a voluntary, student-initiated religious club as only one of several kinds of extracurricular groups would not by itself constitute endorsement of religion. Opponents argue that in the eyes of impressionable primary and secondary school students, official authorization and supervision of such clubs would put the school unit's stamp of approval on religious activities. Courts around the nation tended to bar such clubs as violating the Establishment Clause.[32]

---

[32] Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Johnson v. Huntington Beach Union High Sch. Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Cal. App.), *cert. denied*, 434 U.S. 877 (1977); Trietley v. Board of Educ., 65 App. Div. 2d 1, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978). *But see* Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965).

In 1981 the Supreme Court added a new constitutional perspective to the debate by holding in *Widmar v. Vincent*[33] that the First Amendment's guarantee of freedom of speech required a public university to grant student religious groups access to university facilities that are generally open for use by other student groups. The university in *Widmar* argued that the presence of student religious groups would violate the Establishment Clause, but the Court ruled that allowing equal access would pass the three-part *Lemon* test.[34] It first stated that opening the campus of a public university to student religious groups would serve a neutral, secular policy of maintaining the campus as an open forum for the exchange of ideas. It then held that allowing equal access would not have the primary effect of benefiting religion; instead, any benefit to the group would be merely "incidental" because (a) "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices,"[35] and (b) any impact of such a group on a campus with over 100 recognized student groups would be minimal. Significantly, the Court noted with regard to the effect of university religious groups that "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[36] Third, the Court found that excluding religious groups from a public university campus would risk greater governmental entanglement than admitting them, because such an exclusion would mean that all extracurricular groups would have to be policed to ensure that they did not engage in religious activities.

Although *Widmar* established that allowing student religious groups to use *university* facilities did not violate the Establishment Clause, lower courts continued for several years to differ on the applicability of *Widmar* to secondary schools.[37]

2. The Equal Access Act

Congress responded to this continuing controversy surrounding student religious clubs by passing the Equal Access Act (EAA) in 1984.[38]

---

[33] 454 U.S. 263, 277 (1981).

[34] *Id.* at 271-75. *See* text at note 10 for the *Lemon* test. Lemon v. Kurtzman, 403 U.S. 602 (1971).

[35] 454 U.S. at 274.

[36] *Id.* at 274 n.14.

[37] Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (limiting applicability of *Widmar* where secondary schools are concerned; Bender v. Williamsport Area Sch. Dist., 563 F. Supp. 697, 707 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated and remanded*, 475 U.S. 534 (1986).

[38] Pub. L. No. 98-377, tit. VIII, 98 Stat. 1302 [codified as 20 U.S.C. §§ 4071-4074 (1988)].

The EAA provides that if a public "secondary school"[39] that receives federal aid allows one or more "noncurriculum related" extracurricular student groups to meet on school grounds during "noninstructional time," the school has a "limited open forum" and must grant a fair opportunity ("equal access") to all such noncurriculum-related student groups without discriminating against any such group "on the basis of the religious, political, philosophical, or other content" of views expressed during the group's meetings. The basic thrust of the EAA is to codify *Widmar* for public high schools. That is, once a high school allows *some* student groups to meet on campus for purposes not related to the curriculum, it may not deny similar permission to other noncurriculum-related student groups.

It is important to grasp the broad scope of the EAA. Although introduced to give access to student religious groups, as finally enacted the EAA grants access to all types of extracurricular groups, including political and philosophical groups as well as religious groups. Thus it applies to Young Socialists and Young Gays as well as Young Christians. The EAA applies to mainstream groups and controversial fringe groups alike. A school that allows a Methodist student prayer group or a student Young Democrats group to meet on campus may not, on the basis of its members' views, bar a student Hare Krishna chanting group or a student Socialist group from meeting there.[40]

Note that the EAA applies only to schools that permit groups with activities "not directly related to the school curriculum" to meet during noninstructional time (defined as "time set aside by the school before school classroom instruction begins or after school classroom instruction ends"). That is, a school that does *not* allow any noncurriculum-related groups to meet on campus is exempt from the EAA. Only schools that allow noncurriculum-related groups to meet must open their doors to all such groups.

This skeletal definition has made the task of distinguishing between curriculum-related and noncurriculum-related groups very difficult. While the activities of some types of groups plainly are related to the curriculum (for example, a language club, a choral group, or a literary magazine), others–like service or chess clubs–are not so easily categorized. (The question of how to define "noncurriculum-related group" was addressed by the *Mergens*[41] case that is discussed below in section B.3.)

---

[39] EAA expressly applies to "secondary schools" and defines that term to mean "a public school which provides secondary education as determined by State law."

[40] Particular characteristics of some groups, such as discriminatory membership policies, might justify school officials' refusal to allow meetings under the EAA. *See* note 47 and accompanying text.

[41] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 237 (1990).

A school becomes subject to the EAA by allowing even one noncurriculum-related group to use school facilities. For a club to be permissible under the EAA, the following conditions must prevail:

1. The club must be initiated by the students, and attendance must be voluntary.
2. The club may not be sponsored by the school, although the school may pay the incidental costs of providing space, lighting, and heat. (The EAA does not fully describe what types of support by school officials would constitute prohibited "sponsorship" other than "promoting, leading, or participating in a meeting,"[42] although providing financial subsidies for such clubs or extending extra credit to students who participate would probably be disallowed. This question is discussed below in section B.3.)
3. School employees may not participate in meetings, although an employee may be assigned to the meetings solely to maintain discipline.[43]
4. Group meetings may not interfere with educational activities.
5. Outsiders may not direct or regularly attend group meetings.[44]

The EAA also states that school officials may not attempt to influence the form or content of any prayer or other religious activity, may not expend public funds beyond the incidental cost of providing space for meetings, may not compel a school employee to attend a meeting if the content of the speech at the meeting is contrary to that person's be-

---

[42] 20 U.S.C. § 4072(2) (1988).

[43] *Id.* at 4071(c)(3). Although § 4071(c)(3) prohibits participation of employees only in religious groups, §§ 4071(c)(2) and 4072(2) prohibit participation by employees in all categories of noncurriculum-related groups, except to maintain order and discipline, to protect well-being of students and teachers, and to make sure student attendance is voluntary. Some commentators have questioned whether Congress intended to prohibit employee participation in nonreligious groups, despite the plain language of §§ 4071(c)(2) and 4072(2). *See* Tatel, Mineberg, & Middlebrooks, *An Introduction to the Equal Access Act*, 21 EDUC. L. REP. 7, 11 (1985); AMERICAN ASS'N OF SCH. ADM'R, EQUAL ACCESS: INTERPRETATION AND IMPLEMENTATION GUIDELINES 7 (1984).

[44] 20 U.S.C. § 4071(c)(5). Although the EAA forbids control or regular attendance by outsiders, it does not state whether and to what extent a group covered by the Act may be affiliated with outside organizations. It is conceivable that some forms of affiliation could result in control of a student group by outsiders, in violation of the EAA. In Student Coalition for Peace v. Lower Merion Sch. Dist., 776 F.2d 431 (3d Cir. 1985), the Third Circuit Court of Appeals interpreted the EAA's prohibition of regular attendance by outsiders. In that case, a high school student group sought permission to conduct a peace rally on campus and to invite members of the public to the event. The court pointed out that the EAA does not prohibit occasional attendance by outsiders at student meetings. It ruled that if school officials followed a policy of barring all outsiders from even occasional participation in extracurricular student activities, they could bar outsiders from the peace rally. But if officials permitted some student groups to invite outsiders to their activities, the EAA would require that the same right be extended to the student peace group.

liefs, and may not limit the rights of a student group that does not meet a specified numerical size.[45]

Despite its broad scope and strict conditions, the EAA allows school officials to retain authority over several important facets of extracurricular activity by students. It does not affect the school's control over curriculum-related groups, nor does it require schools to allow student meetings that are otherwise unlawful, such as disruptive or violent gatherings. School officials still have authority to keep order and protect the welfare of students and employees, but they may not ban a meeting out of concern for possible disruptive conduct unless they have specific, reliable evidence that disruption is likely to occur. A group may not be prohibited from meeting for the sole reason that members express controversial or unpopular views,[46] but officials probably may ban groups with discriminatory or secret membership policies.[47]

One court has ruled that in some circumstances, a Christian student club could restrict eligibility for serving as certain officers of the club to Christian students. In *Hsu v. Roslyn Union Free School District No. 3*,[48] the United States Court of Appeals for the Second Circuit struck down a New York school district's rule making all students eligible to hold office in a club under the EAA, regardless of their religious beliefs. The key to the court's decision was its understanding that the club's restriction was essential to the club's identity and to the expressive content of the club's meetings. The court ruled that the restriction proposed by the students did not violate the EAA, the Establishment Clause, or the Equal Protection Clause of the Fourteenth Amendment. However, school offi-

---

[45] 20 U.S.C. §§ 4071(d)(1),(3),(4),(6).

[46] *See generally* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

[47] Regarding discriminatory groups, *see* Knights of Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1974); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). The courts in these cases held, in pertinent part, that the discriminatory membership policies of particular adult political groups did not justify school boards' decisions to deny these groups access to public school facilities for meetings. However, the courts in *Ringers* and *Cason* distinguished between membership by outsiders and attendance at on-campus meetings. They suggested that a school board could deny access to a group that admits members of the public to an on-campus meeting on a discriminatory basis. *See Ringers*, 473 F.2d at 1018; *Cason*, 497 F.2d at 954. Since the meetings of extracurricular student groups occur on campus, the board probably could ban student groups that discriminate in either membership or attendance. Concerning secret societies, *see* Passel v. Fort Worth Indep. Sch. Dist., 453 S.W.2d 888 (Tex. App. 1970); Robinson v. Sacramento City Unified Sch. Dist., 53 Cal. Rptr. 781 (Cal. App. 1966). *See also The Equal Access Act: A Haven for High School "Hate Groups?"* 13 HOFSTRA L. REV. 589, 597-603 (1985).

[48] 85 F.3d 839 (2d Cir. 1996).

cials and school board attorneys should scrutinize this decision carefully before following it. Even in districts in the Second Circuit, officials and board attorneys should carefully consider whether the ruling in *Hsu* governs other cases, since the court made it clear that its decision depended on the particular facts of that case. The Second Circuit went to great lengths to try to explain that its decision in *Hsu* would not necessarily open up extracurricular programs under the EAA to clubs practicing "invidious" discrimination, such as racist clubs barring Blacks as officers or even as members. But the court's assurance that school officials still have the power under the Equal Protection Clause and the Free Speech Clause to prohibit extracurricular clubs from engaging in such discrimination relies on an unreliably vague distinction between the discrimination involved in *Hsu* and other forms of discrimination deemed to be "invidious."

Finally, the EAA does not significantly affect school officials' control over access to school facilities by nonschool community groups.[49]

3. The *Mergens* Case

Despite the passage of the Equal Access Act in 1984, controversy over student-initiated religious clubs continued. Some school boards interpreted the EAA in a questionable way, or argued that it violated the Establishment Clause and therefore was unconstitutional.[50] A major point of controversy was how the term "noncurriculum-related student group" was to be defined. In 1990 the Supreme Court addressed these issues in *Board of Education of Westside Community Schools v. Mergens*.[51]

Bridget Mergens was a student at Westside High, a public secondary school in Omaha. In January 1985, she asked permission to form a club in which students would read and discuss the Bible, enjoy fellowship, and pray together. The proposed club sought the same privileges (including access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair) as other officially recognized Westside clubs enjoyed except that it would not have a faculty sponsor. Membership would be voluntary and open to all, regardless of religious affiliation. When her request was denied, Mergens challenged the denial in federal district court on the grounds that it violated the EAA and her First and Fourteenth Amendment rights to the free exercise of religion. The school board responded that the EAA did not apply because Westside

---

[49] *See infra* notes 215-23 and the accompanying text.

[50] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 233 (1990); Garnett v. Renton Sch. Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989), *vacated and remanded*, 496 U.S. 914 (1990).

[51] 496 U.S. 226 (1990).

was not a limited open forum, and even if the school did maintain such a forum, the EAA was unconstitutional because it violated the Establishment Clause of the First Amendment. The trial court ruled for the school board but was reversed by the Eighth Circuit Court of Appeals, which held that many of Westside's student clubs were noncurriculum-related. This fact, the circuit court said, triggered the EAA's requirement that the school not deny recognition to Mergens' group on the basis of the religious content of the club's speech.[52] The court also held that the EAA was constitutional on the grounds that it extended the *Widmar* decision to public secondary schools. The school board appealed.

The United States Supreme Court was presented with two issues. Were any of Westside's student groups noncurriculum-related, so as to trigger the EAA's equal access requirement? And if so, did the EAA itself violate the Establishment Clause? The Court held that some of Westside's clubs were noncurriculum-related, and Westside was thus a limited open forum for purposes of the Act. It also held that the Act was constitutional as applied to Westside. In doing so, it defined a curriculum-related student group as one that has "more than just a tangential or attenuated relationship to courses offered by the school"[53] and a noncurriculum-related student group as one "that does not *directly* relate to the body of courses offered by the school."[54] Justice O'Connor, joined by five other members of the Court,[55] delivered the majority opinion.

With regard to the first issue,[56] Justice O'Connor offered this clarification:

> [A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[57]

The Court gave some examples of student groups that would be directly related to a school's curriculum: a French Club if French was a regularly offered course; student government to the extent that it concerned itself with the body of courses offered; and the band or orchestra if membership either was required for certain music classes or resulted in academic credit.

---

[52] Mergens *ex rel.* Mergens v. Board of Educ., 867 F.2d 1076, 1079 (1989).
[53] *Mergens*, 496 U.S. at 238.
[54] *Id.* at 239.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 239-40.

The Court then asked whether all of Westside's student groups were curriculum-related and found that the Scuba Diving Club and the Chess Club did not fit that description. The subject matter of these clubs was not taught in any regularly offered course. Furthermore, participation in them was not required for any class, nor would participation in them result in academic credit. Thus, having accepted these two noncurriculum-related groups, Westside was a limited open forum subject to the Equal Access Act and could not deny Mergens' group official recognition on the basis of its religious orientation.

The Court also held, by a plurality opinion, that the EAA did not violate the Establishment Clause and was thus constitutional. Four justices[58] upheld the EAA on the basis of the familiar *Lemon* test[59] and the logic of *Widmar*.[60] Because the EAA forbids discrimination against political and philosophical expression as well as religious speech, the justices found that it had a secular legislative purpose that neither endorsed nor disapproved of religion. They also found that the EAA did not have the primary effect of advancing religion. They reached this conclusion for three reasons. First, the Court refused to second-guess Congress in its determination that high school students were mature enough to distinguish between speech that a school permits on a nondiscriminatory basis and speech that is officially endorsed. Second, because the EAA expressly limits the participation of school officials, the justices found little risk of state endorsement. Third, "[t]o the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."[61] Finally, the Court found no excessive government entanglement because the EAA forbids faculty monitors from participating in, leading, or promoting the meetings.

4. Implications: Student Religious Clubs after *Mergens*

Mergens resolved in two ways some questions that educators had been grappling with since the EAA was enacted. First, by holding the law constitutional, the Supreme Court indicated that secondary schools *may* permit student-initiated religious clubs in accordance with its provisions. Further, if secondary schools permit even one noncurriculum-related club, religious or otherwise, to meet on campus, they must grant equal access to other student-initiated religious, political, or philosophical groups and must comply with the conditions of the Equal Access Act.

---

[58] Chief Justice Rehnquist and Justices White, Blackmun, and O'Connor.
[59] *Mergens*, 496 U.S. at 248.
[60] *Id.*
[61] *Id.* at 252.

Second, now that the Court has defined "non-curriculum-related student groups," a school board can, with a greater degree of certainty, determine whether its existing school clubs require that it conform with the EAA. A school board can use this definition either (a) to formulate a school policy that forbids *all* noncurriculum-related clubs in order to avoid having to comply with the EAA, or (b) to adopt policies that permit noncurriculum-related student clubs and thus accept an obligation on the schools to conform with the EAA's requirements.

School systems that wish to avoid being subject to the EAA must revise their policies to reflect this choice, review the list of permitted clubs at their high schools, and make adjustments to assure that all clubs qualify as "curriculum related" as the term is defined in *Mergens*. By that standard, a club is curriculum-related if its subject matter is actually taught, or will soon be taught, in a regularly offered course; or if the subject matter is concerned with the body of courses as a whole; or if participation in the club is required for a particular course; or if participation results in academic credit.[62] Further, a "curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school."[63]

Some of its extracurricular clubs might have to be eliminated if a school chose to avoid the EAA. A club that appeared to fall outside the "curriculum related" definition could possibly be brought within the curriculum-related category by expanding the subject matter of a school course to cover the club's subject matter or by altering the club's subject matter to include material directly related to the curriculum. For example, the physical education curriculum could be expanded to cover scuba diving or bowling, or the Chess Club could incorporate structured sessions on mathematical reasoning.

But a school that attempts such "fine tuning" should be aware that Justice O'Connor in *Mergens* explicitly stated that the Court *rejected* attempts to define "'curriculum related' in a way that results in almost no schools' having limited open forums, or in a way that permits schools to evade the Act by strategically describing existing student groups . . . ."[64] Thus defining "curriculum related" as "anything remotely related to abstract educational goals"[65] or thinly disguising attempts to evade the provisions of the EAA through token adjustments to curriculum or subject matter of clubs would probably not withstand a court challenge. Unfortunately, the *Mergens* opinion offers no guidance as to the quantity or qual-

---

[62] *Id.* at 239-40.
[63] *Id.* at 238.
[64] *Id.* at 244.
[65] *Id.*

ity of actual instruction needed in order to make a club qualify as being curriculum-related. Thus, for example, it is unclear whether adding a two-hour session on scuba diving to the physical education curriculum would provide sufficient basis to make a Scuba Diving Club curriculum-related.

Schools that choose to permit only curriculum-related clubs would be wise to include in their school policy handbook a statement that describes how each permitted club is related to the curriculum. In *Mergens*, Justice O'Connor found that such statements as "Choir 'is a course offered as part of the curriculum'; . . . International Club is 'developed through our foreign language classes'; . . . Latin Club is 'designed for those students who are taking Latin as a foreign language'" are "persuasive evidence that these student clubs directly relate to the curriculum."[66] Once again, however, schools will not be able to use broad definitions of "curriculum related" in a way that will render the EAA meaningless. As noted earlier, a curriculum-related group must have more than just a "tangential or attenuated relationship to courses offered by the school."[67]

School systems that choose to permit noncurriculum-related student groups must comply with the provisions of the EAA. It is important to note that although the Supreme Court held that the EAA did not, on its face and as applied to Westside High, violate the Establishment Clause, certain types of school support or endorsement of student religious clubs would almost certainly violate the Establishment Clause. To avoid such violations, schools should conform to the requirements of the EAA and pay careful attention to the *Mergens* decision and the types of conditions the Court seemed to approve in that case.

First, school policies and student handbooks should clearly state that the school does not endorse or support the views of student-initiated noncurriculum-related clubs. Second, teachers assigned to monitor meetings of these groups should be explicitly told not to participate in or attempt to influence the format or content of the meetings. Care should be taken that the school's name not be identified with the aims, policies, or opinions of a noncurriculum-related student organization.

One issue not addressed by the *Mergens* decision was whether the Establishment Clause would be violated if the variety of privileges extended to Westside's officially recognized clubs (access to the school newspaper and bulletin boards, the public address system and the annual Club Fair) were also granted to noncurriculum-related religious groups. Because the Court did not specifically comment on this matter, presumably Westside could grant a religious club the same privileges as it extended to the officially recognized clubs. But it also seems that schools

[66] *Id.* at 246.
[67] *Id.* at 238.

may develop two different categories of officially recognized school clubs: curriculum-related clubs that receive extensive privileges, such as financial support and extra credit for student participation; and noncurriculum-related clubs whose privileges are restricted, for example, to places to meet and specified modes of communication with the school. If a school adopts this type of system, the categories should be strictly delineated according to the criteria established by the *Mergens* decision.

Another case that bears on the EAA is *Pope v. East Brunswick Board of Education*,[68] which explores the issue of what types of clubs will be held to be curriculum-related. In that case, a school refused to allow students to form a Bible Club on the grounds that the school board had created a closed forum and did not allow clubs that were not related to the curriculum. When the federal district court ruled in favor of the students, the school board appealed to the Third Circuit Court of Appeals. That court recognized that a school district may eliminate all noncurriculum-related student groups and maintain its schools as totally closed forums. The school board had, however, permitted a Key Club at the high school. The Key Club was a student service club in which members engaged in a variety of activities to raise funds for charities. The appeals court concluded that the Key Club was not curriculum-related. It rejected the school board's argument that the Key Club's alleged tangential relationship to a history unit on poverty, hunger, and homelessness made the club curriculum-related. Indeed, by the board's logic, the Bible Club itself would have been curriculum-related because of the Bible's relevance to history, literature, and art. Thus the Equal Access Act was triggered and the school was a limited open forum despite the school board's contentions to the contrary. Because the school was a limited open forum, the school violated the Equal Access Act when it refused to allow students to form a Bible Club. The appeals court affirmed the district court's holding in favor of the students who sought to form a Bible Club.

5. Student Religious Clubs Under State Constitutions

Since the *Mergens* decision, two cases have considered whether allowing student religious clubs to meet on school property violates the provisions of a state's constitution. In *Garnett v. Renton School District*,[69] the Ninth Circuit Court of Appeals ruled that state constitutions can be *more* protective of individual rights than the Federal Constitution, but states may not abridge rights granted by federal law. Since the EAA gives student religious groups a federal right, state law must yield to the exer-

---

[68] 12 F.3d 1244 (3d Cir. 1993).

[69] 987 F.2d 641, 646 (9th Cir. 1993).

cise of that right. In *Hoppock v. Twin Falls School District No. 411*,[70] a federal district court in Idaho concluded that the EAA "was passed 'in pursuance' of the Constitution and that there [was] an arguable conflict between the EAA and the Idaho Constitution. Under these circumstances, the Supremacy Clause [provided] that the Idaho Constitution cannot be used to block operation of the EAA."[71]

6. Religious Clubs in Elementary Schools

As discussed earlier, the EAA applies only to secondary schools; elementary school students cannot claim a right to form extracurricular religious clubs under the EAA. Nevertheless, questions might still arise under the Free Speech or Free Exercise Clauses or under the RFRA about whether elementary school students have a right to form religious clubs. In *Bell v. Little Axe Independent School District*,[72] the Tenth Circuit Court of Appeals held in 1985 that the Establishment Clause prohibits extracurricular student religious clubs in elementary schools.

Quappe v. Endry[73] involved the Good News Club, which had met immediately after school (3:30 p.m.) at an elementary school since the club was founded in the early 1970s. Other organizations that met at the school immediately after school included the Girl Scouts and a "Just Say No to Drugs" group. The Boy Scouts, cheerleaders, and community sports teams used the school's facilities in the early evenings. In 1987, in an effort to avoid the appearance that the Good News Club was sponsored by the school, the school board refused to allow the group to meet at 3:30 p.m. but granted permission to do so at 6:30 p.m. Club members filed suit in federal district court, alleging that the board violated their First Amendment right to the free exercise of their religion.

The court upheld the school board's decision. It noted that elementary school children are impressionable and unable to distinguish state from private sponsorship. Further, in this particular case a teacher had actively participated in the club and used her class to recruit members for the club. Her participation created a substantial danger that students would view the club as an officially endorsed extension of the regular school day. This factor established a symbolic link between the school and the club, in violation of the Establishment Clause. The court held that the board's decision to break the continuity between the end of the school

---

[70] 772 F. Supp. 1160 (D. Idaho 1991).

[71] *Id.* at 1164. For further discussion of this issue, *see* Eugene Bjorklun, *Implementing the Equal Access Act and State Constitutional Provisions*, 74 EDUC. L. REP. 1 (1992).

[72] 766 F.2d 1391 (10th Cir. 1985).

[73] 772 F. Supp. 1004 (S.D. Ohio 1991). *See also* ch. 6, sec. B for a discussion of school policies regarding use of facilities for after-school activities or clubs sponsored by outside groups.

day and the club's meeting time did not exhibit hostility to religion, as the plaintiffs claimed, but demonstrated the type of accommodation of religious activity demanded under the First Amendment.

The court stressed, however, that the determination of Establishment Clause cases is a fact-specific inquiry that may be altered by any of many factual permutations. It thus acknowledged the possibility that in another case in which a teacher had *not* been actively involved, the danger of the appearance of state endorsement might be reduced or eliminated. Therefore, under different circumstances, a school board might not be able to justify its decision to refuse to allow one group to meet immediately after school on the basis of the content of its speech if the forum is open to other groups at the same time.

C. Prayers at Special Occasions

1. Graduation

Before 1992, courts around the nation differed on whether prayer recited as an invocation or benediction at public school graduation ceremonies was constitutional.[74] In *Lee v. Weisman*[75] the United States Supreme Court held, by a 5-4 margin, that the Establishment Clause was violated when a middle school principal invited a clergyman to deliver "nonsectarian" prayers during the school's graduation ceremony. But *Lee* did not address all forms of graduation prayer, and the law on graduation prayer is therefore still unsettled.

Lee involved the policy of the school board in Providence, Rhode Island, that permitted principals to invite members of the clergy to offer invocation and benediction prayers as part of graduation ceremonies for middle schools and high schools. A parent of a middle school student sued school officials in federal district court, asking the court to enjoin school officials from inviting clergy to deliver invocations and benedictions at future graduations. After a federal district court and the First Circuit Court of Appeals ruled for the parent, the United States Supreme Court agreed to hear the case.

---

[74] For examples of pre-*Lee* cases striking down graduation prayer as unconstitutional, *see* Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982); Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987). For examples of pre-*Lee* cases upholding graduation prayers, *see* Stein v. Plainwell Community Sch., 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Weist v. Mt. Lebanon Sch. Dist., 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974).

[75] 505 U.S. 577 (1992).

Justice Kennedy, in an opinion joined by four other members of the Court, said that the issue to be decided was "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment . . . ."[76] Looking at the facts in the case, he noted that a school official, the principal, decided that an invocation and a benediction should be given, chose a clergyman–a rabbi–to deliver the prayers, gave the rabbi guidelines for the prayers, and instructed him that the prayers should be nonsectarian, thus directing and controlling their content. This degree of school involvement made it clear that the graduation prayers bore the imprint of the state.

Kennedy next examined the effects of prayers on the students, both those who desired the prayer and those who did not. While acknowledging that the First Amendment protects speech and requires citizens in a pluralistic society to tolerate speech they find disagreeable or offensive, Kennedy rejected this reasoning as a basis for requiring dissenters to tolerate the graduation prayers. He explained that the free speech rights of those who desire religious speech cannot be exercised in a way that causes a violation of the Establishment Clause. Further, the Court traditionally has shown heightened concern for protecting freedom of conscience in religious matters from coercion in elementary and secondary schools. According to Kennedy, a reasonable dissenter at the graduation ceremony could believe that simply standing in respectful silence during the group exercise signified his or her own participation in or approval of it. Thus officially invited prayer places students in primary or secondary schools in a position in which objectors must either participate or protest, a position that is inconsistent with the Establishment Clause. For Justice Kennedy, when the state invited the rabbi to deliver prayers, it in essence required students at the graduation ceremony to participate in a religious exercise. Though the Court acknowledged that the prayers were brief, it rejected the argument that they were too minor in character to cause legal concern. It reasoned that to accept the prayers as trivial was an affront to the rabbi and to all others for whom they represented an acknowledgment of divine authority.

The Court also rejected the argument that the fact that attendance at graduation was voluntary in some way excused what the Court viewed as state-coerced participation in a religious exercise. It stated that "while attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of

---

[76] *Lee*, 505 U.S. at 580.

those intangible benefits which have motivated the student through . . . her high school years."[77] "The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[78]

The Court also rejected the argument that prayers at graduation should be viewed in the same light as prayers at the beginning of a legislative session, which it had upheld as constitutional in *Marsh v. Chambers*.[79] According to the Court, adults at the opening of a legislative session are free to enter and leave the chamber without constraint. That atmosphere cannot be compared with the constraining potential of a single school event, controlled by school officials, that is the culmination of the student's public school career. While the Court explicitly noted that prayer at a graduation ceremony is not permitted because of the coercive context of public schools and the impressionable nature of young students, it did not address in *Lee* whether a choice to "participate or protest" would violate the Establishment Clause if the circumstances involved adults.

Thus the Court held that the graduation prayers in *Lee* violated the Establishment Clause on the grounds that a school may not compel a student to participate in a religious exercise. School officials must now apply the holding in *Lee* to the way graduation ceremonies and other activities are conducted in their school systems. Clearly they may not do as school officials in *Lee* did: decide to include a prayer in a graduation ceremony, select and invite a member of the clergy to deliver the prayer, and control the content of the prayer by providing the cleric with written and oral instructions about its content.

But several questions remain. For example, does *Lee* ban all prayers from graduation ceremonies or only prayers offered at the choice and direction of school officials–in other words, prayers offered in the precise fact situation in *Lee*? Justice Scalia suggested in his dissent that invocations and benedictions may still be given as long as school authorities make clear that a student is not necessarily presumed to be participating in prayers even though he or she does not overtly protest. According to Scalia "[a]ll that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so."[80] Despite Scalia's suggestion, there is no judicial precedent to support his contention that a written or oral disclaimer at

---

[77] *Id.* at 595.
[78] *Id.* at 596.
[79] *Id.* at 2660, *citing* Marsh v. Chambers, 463 U.S. 783 (1983).
[80] *Id.* at 645 (Scalia, J., dissenting).

the beginning of the ceremony is sufficient to overcome what the Supreme Court's majority saw as the coercive effect of a graduation ceremony directed by school authorities.[81]

Does *Lee* ban graduation prayers if students, rather than school officials, decide whether to include prayers at graduation ceremonies, compose the prayer, and select a student to deliver it? This issue has been addressed by several courts. According to the facts of *Jones v. Clear Creek Independent School District*,[82] a resolution by the school board permitted high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations and benedictions at their graduation ceremony.[83] Ruling before the Supreme Court handed down its decision in *Lee*, the Fifth Circuit Court of Appeals applied the three-part *Lemon* test and concluded that the school board's resolution did not violate the Establishment Clause.[84] After its decision in *Lee*, the Supreme Court vacated the Fifth Circuit's judgment and remanded the case to the circuit court for further consideration in light of *Lee*.

On remand, the circuit court declared that marking the solemnity of the occasion was a legitimate secular purpose of ceremonial prayer. It further held that the primary effect of the school board's resolution in *Jones* was to solemnize graduation ceremonies rather than to advance a specific religious belief, because the prayers were nonsectarian in nature. The court also held that a yearly review of unsolicited material for sectarianism and proselytization was not excessive entanglement. Thus the Fifth Circuit Court affirmed its original holding that the resolution met the three-prong test of *Lemon*.

The court then considered whether the resolution unconstitutionally coerced or endorsed support for religious beliefs. It interpreted *Lee* to define unconstitutional endorsement as occurring "when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices."[85] The court then compared the facts and holding in *Lee* with the Supreme Court's decision in *Board of Education*

---

[81] Martha M. McCarthy, *Is the Wall of Separation Still Standing?* 77 EDUC. L. REP. 1, 11 (1992).

[82] 930 F.2d 416 (5th Cir. 1991) (*Jones I*), *vacated*, 505 U.S. 1215 (1992), *on remand*, 977 F.2d 963 (5th Cir. 1992) (*Jones II*), *cert. denied*, 508 U.S. 967 (1993).

[83] The resolution provides: 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal; 2. The invocation and benediction, if used, shall be given by a student volunteer; and 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature. 977 F.2d at 964 n.1.

[84] 930 F.2d 416 (5th Cir. 1991) (*Jones I*).

[85] 977 F.2d at 968 (*Jones II*), *also citing* Lee v. Weisman, 505 U.S. at 606 (Blackmun, J., concurring).

of Westside Community Schools v. Mergens.[86] In *Mergens* the Court held that a public school does not unconstitutionally endorse religion by permitting a student-initiated religious club to meet on school grounds as long as the school accords equal privileges to other noncurriculum-oriented student organizations. The circuit court reasoned that the circumstances in *Jones* were comparable with those in *Mergens* in that the resolution did not mandate an invocation; it merely permitted prayers if seniors chose to have them. Also, students composed the prayer and selected a fellow student to deliver it.

According to the Fifth Circuit, a graduating "senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government choice."[87] While acknowledging that the resolution could be implemented in a way that would result in unconstitutional government endorsement, the court found the resolution itself to be constitutional unless there was no way to implement it on a nondiscriminatory basis. Thus the court concluded that the resolution did not constitute unconstitutional endorsement of religion by government officials.

Finally, the court examined whether the resolution unconstitutionally coerced student participation in a religious exercise. According to the Fifth Circuit, *Lee* defines unconstitutional coercion as occurring when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. Looking to the facts, the court concluded that the resolution in *Jones* differed from the situation in *Lee* because it did not place government officials in the position of directing prayer. Government officials made no decisions with respect to the delivery of an invocation or a benediction, nor did they choose the person to deliver the prayers or influence the prayers' content. The resolution merely passively permitted prayers if the senior class decided to have them. Further, the court found that the resolution did not allow government officials to direct a formal religious exercise but merely tolerated a nonsectarian, nonproselytizing prayer. Last of all, in the circuit court's opinion, the graduation prayers permitted by the *Jones* resolution placed less psychological pressure on students than the prayers in *Lee* because students who have participated in the decision to include prayers are aware that the prayers represent the will of their peers, who–according to the Fifth Circuit–are less able to coerce participation than an authority figure from the state or the clergy. Thus the circuit court found

---

[86] 977 F. 2d (*Jones II*), at 968.

[87] *Id.* at 969.

that the resolution did not unconstitutionally coerce participation in a religious exercise. In sum, the court found the resolution to be constitutional despite the recent holding in *Lee*.

In 1994, in *Adler v. Duval County School Board*,[88] a federal district court in Florida adopted the Fifth Circuit Court's analysis in upholding a policy that directed the senior class to decide whether to have opening and closing messages and to select student volunteers to give the messages without prior review of the messages' content by school officials.

However, decisions in two other federal court cases disagree with the holdings in *Jones* and in *Adler*. In *American Civil Liberties Union of New Jersey v. Blackhorse Pike Regional Board of Education*,[89] the Third Circuit Court of Appeals enjoined a student-initiated graduation prayer similar to the one upheld by the Fifth Circuit Court in *Jones*. The court held that a prayer presented as an invocation or benediction at graduation, even if it is student-initiated, is unconstitutional because the graduation ceremony is a school-sponsored event. The fact that the school board chooses to delegate the decision regarding one part of the ceremony to students does not alter the sponsorship, nor does it diminish the effect of the prayer on students who do not share the belief expressed in the prayer.

In *Gearon v. Loudoun County School Board*,[90] a district court in Virginia ruled that allowing high school students to decide whether to include prayer in a graduation ceremony violated the Establishment Clause. According to the court, state sponsorship–that is, involvement in graduation ceremony–is inherent in public school graduation exercises. The *Gearon* court concluded that the Establishment Clause is violated (and students are constructively excluded from an event) if they are involuntarily subjected at such an event to a display of religion that is offensive or not in agreement with their own religion or lack of religion. The court reasoned that an individual's constitutional rights cannot be made subject to a majority vote.

In addition, the court in *Gearon* ruled that even if graduation at the high school level is not inherently state sponsored, the facts of the case also demonstrated excessive state entanglement with religion, in violation of the Establishment Clause. Among the facts the court found to indicate excessive involvement were these: (1) The superintendent of schools issued a memorandum pointing out that the *Jones* case provided a way to avoid the *Lee* decision; (2) the school board passed a resolution

---

[88] 851 F. Supp. 446 (M.D. Fla. 1994).
[89] 84 F.3d 1471 (3d Cir. 1996) (en banc).
[90] 844 F. Supp. 1097 (E.D. Va. 1993).

that exhorted student-sponsored invocations and benedictions at high school graduations; (3) all four county high schools used the same ballot, prepared by school officials, to vote for or against prayers at graduation; (4) at all but one high school, the principal took action to initiate a senior class meeting for the purpose of voting on the matter; (5) all class meetings were mandatory; and (6) at all schools the remarks were reviewed by the faculty or the principal before they were made.

For these reasons, the district court concluded that permitting prayer in a state- or school board-sponsored high school graduation ceremony is a violation of the Establishment Clause. Further, the court noted, "the manner in which the School Board and its superintendent and high school principals permitted prayer in the high school graduation does not reflect a clearly secular purpose, has a primary effect that advances . . . religion, and does not avoid excessive government entanglement with religion."[91]

As these two cases indicate, the holdings in *Jones* and *Adler,* which permit student-initiated prayers at graduation, must be viewed with caution.[92] As the *ACLU* and *Gearon* cases illustrate, not all courts agree with the conclusion that student-initiated prayers are not coercive. As the courts in both cases point out, invocations and benedictions are still parts of a graduation ceremony over which school officials have basic authority and control. Once graduates have marched in, they are still faced with the same choices available to objectors in *Lee*–participate or protest, a situation found unacceptable by the Supreme Court. Despite the reasoning of the Fifth Circuit Court, the circumstances in *Jones* do not seem similar to those in *Mergens*. The *Mergens* holding would never place a student who did not want to pray in such a position that he or she had to listen to a prayer, much less require the student to decide whether to stand in respectful silence or sit in protest. Moreover, a key facet of *Mergens* is that extracurricular groups formed under the EAA are not school-sponsored activities, while graduation is school sponsored.

---

[91] *Id.* at 1102.

[92] In Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated*, 115 S. Ct. 2604 (1995), the United States Court of Appeals for the Ninth Circuit agreed with the Third Circuit and the Virginia Federal District Court that student-initiated graduation prayer violates the Establishment Clause. The Ninth Circuit held that graduation prayer is a school-sponsored event; that school officials cannot avoid their constitutional duty to enforce the Establishment Clause by delegating the decision on prayer to students, and that control of religious expression by majority vote is precisely what the Establishment Clause prohibits. However, the United States Supreme Court vacated the Ninth Circuit's decision because the student who challenged the prayer policy had graduated, making the case moot and terminating federal jurisdiction over the case. The Supreme Court's order prevents the Ninth Circuit's decision from having the authority of precedent, though the Ninth Circuit's analysis still can be persuasive in similar cases. The Supreme Court's order was *not* a decision on the merits of the case.

To return to the original question: Does *Lee* ban graduation prayers even if students, rather than school officials, decide whether to include prayers in graduation ceremonies and then compose and deliver the prayers? *Jones* and *Adler* will be cited to argue that student-controlled prayer is permissible. *ACLU* and *Gearon* will be cited to argue that the practice is not constitutional.

The respective decisions of the Third Circuit Court and the district court in Virginia in *ACLU* and *Gearon* seem persuasive: Prayer in an official school activity would appear to signal official endorsement and would seem to be coercive, regardless of whether it results from decisions by school officials or by a majority of graduating seniors to whom school officials have delegated the decision. Indeed, if all that is required in order to avoid the dictates of the Establishment Clause were for school officials to delegate their duty to control the content of school-sponsored activities to a majority of students, school officials could also delegate the choice over daily classroom prayer to majority vote by students. Moreover, the Fifth Circuit's rationale in *Jones* seems questionable. It does not seem realistic to claim, as the court did in *Jones*, that high school students find peer pressure resulting from the majority vote of their classmates to be less coercive than decisions by school officials or clergy.

School districts governed by *Jones* and *Adler* may (but are not required to) allow student-initiated graduation prayers. School districts in areas governed by *ACLU* and *Gearon* may not allow such prayers. Officials in other districts must make their own decisions without the benefit of judicial precedent. In those districts, the most prudent course of action would be to follow the holding in *Lee* and eliminate prayers from graduation ceremonies. Such a policy may not be popular, but it would reflect a careful interpretation of *Lee* and a faithful interpretation of the Establishment Clause.

2. Baccalaureate Services

In the wake of the *Lee* decision, school sponsorship of a baccalaureate service would certainly seem to be an unconstitutional endorsement of religion. However, private baccalaureate services, conducted by churches or other groups, are permissible if they are not part of the official graduation ceremony and students are not encouraged or influenced to attend by school officials. Indeed, the holding of private baccalaureate services, in lieu of graduation prayer at school-sponsored graduation ceremonies, would reflect a sensitive and appropriate grasp of the Establishment Clause: it would properly avoid officially authorized prayer during a school-sponsored event, while enabling members of a community to gather privately to express and celebrate fully the religious significance

of graduation in the lives of graduating seniors and their families. If a private baccalaureate service is held, school personnel should be able to attend as long as school officials do not require or encourage their attendance and as long as they are not attending in an official capacity.

A related issue is whether school facilities may be used for private baccalaureate services. In 1991 a federal district court in Alabama ordered a school to rent its auditorium to a local church for a baccalaureate service.[93] The court reasoned that because the school had a policy of renting its facilities to a wide variety of nonschool groups, it could not discriminate against the church on the basis of its religion by refusing to rent the facility to it. The court did, however, caution school officials to avoid any activity that would convey a message that the school officially endorsed the service. Specifically, it required school officials to disclaim any official connection to the event in their communication with students, parents, school employees, and members of the community. It also stated that school officials could not promote, lead, or participate in the service, and it ordered school officials to be sensitive to the possibility that some students might pressure their classmates to attend the service.

In a similar case, *Shumway v. Albany County School District No. 11*,[94] a federal district court in Wyoming held that a school board violated the First Amendment rights of a group of students and parents when it refused to rent a school gymnasium to the group for a privately sponsored baccalaureate service that would be open to the public and all students who wished to participate. The court held that the Supreme Court decision in *Lamb's Chapel v. Center Moriches Union Free School District*[95] indicates that where a school has an open-access policy on rental of facilities, allowing use of facilities to groups for religious purposes is not necessarily incompatible with the Establishment Clause.[96] It acknowledged that several facts in the case suggested an "aura of affiliation" between the school and the religious service, including these: graduation and baccalaureate information was printed on a single announcement; a letter written by the school principal referred to the baccalaureate ser-

---

[93] Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991). *See also* Randall v. Pegan, 765 F. Supp. 1320 (W.D.N.Y. 1991) (denying a graduating senior and father a preliminary injunction to prevent a school district from leasing a high school auditorium to a nondenominational student group for baccalaureate services. Since the school board had publicly disassociated itself from the service, the practice of maintaining the auditorium as an open forum for rental purposes did not have the primary effect of advancing religion).

[94] 826 F. Supp. 1320, 1327 (D. Wyo. 1993).

[95] 508 U.S. 384 (1993).

[96] *Shumway*, 826 F. Supp. at 1326.

vice; the school choir and orchestra were to participate in the ceremony; and the parents of some graduating seniors who planned to participate in the baccalaureate ceremony were also school district employees. Despite these links between the school and the baccalaureate, the court held that the district had adequately separated itself from the service: "[A]lthough the Board's dissociation from the baccalaureate ceremony could have been more unequivocal, the evidence also clearly demonstrated that baccalaureate was being sponsored by a private group of parents and students and that the event was not being sponsored by the school district itself."[97] Because there was little danger that the community would think the board was endorsing religion, the court said, it enjoined the school district from denying the group of students access to the gymnasium for the service.

3. Athletic and Other Extracurricular Events

A situation similar to prayer during graduation is prayer during school athletic events–for example, as an invocation or during halftime at high school football games. In the spectrum between prohibited and permitted religious practices, such prayer seems to fall somewhere between graduation prayer and officially sanctioned prayer during the regular school day. Like graduation ceremonies, sporting events might seem separate from instruction and the school day in that the events do not occur on a daily basis, attendance is voluntary, and parents and other adults not affiliated with the school often attend. However, considered under the three-part *Lemon* test, prayer at athletic events seems to have a religious purpose; it implies the school's approval of the prayer's religious message; and it entangles school officials with religion through planning and approval of the prayer. Also, although athletic contests do not occur daily, they occur more frequently than graduation ceremonies. Moreover, they can be regarded as related to instruction, since they teach student athletes important lessons about such values as team play, discipline, and sportsmanship. Consequently, prayer offered on such occasions is not just an isolated event but rather plays a larger role in shaping a school unit's official attitude toward religion.

Before the Supreme Court decided *Lee v. Weisman*,[98] only two cases had addressed the issue of prayer at extracurricular activities. In *Jager v. Douglas County School District*,[99] the Eleventh Circuit Court of Appeals affirmed a district court's ruling that prayers read by a Protestant minis-

---

[97] *Id.* at 1327.

[98] 505 U.S. 577 (1992).

[99] Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

ter over a loudspeaker before home football games violated the Establishment Clause. The appellate court also enjoined an alternative "equal access" plan that called for invocations to be given by students, parents, or staff members (but not clergy) selected at random by the student government. The court held that both the traditional practice of invocations delivered by ministers and the equal-access plan violated the first two parts of the *Lemon* test in that promoting Christianity was their purpose and primary effect. It explained that any legitimate secular purpose of a pregame invocation could effectively be served by a secular invocation. The holding in *Lee* would seem to confirm the authority and reasoning of the Eleventh Circuit in the decision.

In *Doe v. Aldine Independent School District*,[100] a federal district court in Texas held that recitation of an expressly Christian prayer at athletic contests, pep rallies, and graduation ceremonies violated the Establishment Clause. Even though attendance and prayer recitation at these events were voluntary, the principal or other school employees initiated the prayer on these occasions.

In *Doe v. Duncanville Independent School District*,[101] decided after *Lee*, the Fifth Circuit Court ruled that a district court properly granted a preliminary injunction forbidding Duncanville school employees from initiating and leading students in prayer before and after athletic practices and competition. The court ruled that the *Mergens* case and the Equal Access Act did not apply to the situation in *Doe* because athletics are extracurricular school-sponsored activities, not noncurricular activities like the ones in *Mergens*. Further, even if high school athletics are noncurricular, the fact that the coach initiated and led the prayers violated the minimal custodial oversight allowed by *Mergens*.

In addition, the facts in the *Doe* case were very similar to those in *Lee v. Weisman*[102] in that a school official (the coach) chose and composed the prayer, and subtle coercive pressure to participate was used to induce students to participate in an activity they might otherwise reject. Thus the court ruled that the plaintiffs had a shown substantial likelihood that they would succeed in their claim that the prayers offered at athletic activities violated the Establishment Clause.

In a similar case, *Steele v. Van Buren Public School District*,[103] the Eighth Circuit Court of Appeals affirmed an injunction prohibiting a high school band teacher from leading the band in prayer at mandatory re-

---

[100] 563 F. Supp. 883 (S.D. Tex. 1982).

[101] 986 F.2d 953 (5th Cir.), *opinion withdrawn and superseded*, 994 F.2d 160 (5th Cir. 1993).

[102] Lee v. Weisman, 305 U.S. 577 (1992).

[103] 845 F.2d 1492 (8th Cir. 1988).

hearsals and performances. It has been argued that prayers at extracurricular activities are acceptable because unlike classroom attendance, which is mandated by law, extracurricular activities are voluntary. The *Lee* decision would seem to contradict this argument. In *Lee* the Supreme Court strongly emphasized that the involvement of school officials in deciding whether to have prayers, selecting persons to deliver prayers, and influencing the content of prayers indicated an unconstitutional endorsement of religion. To the extent that prayers at athletic events and other extracurricular activities include the same type of involvement by school officials, they would seem to bear the state imprimatur that was proscribed by *Lee*.

But none of these cases–*Jager, Doe*, *Lee*, or *Steele*–forbids students from gathering in the locker room before a game, or in a rehearsal room before a rehearsal or performance, for a prayer as long as the prayer is initiated and carried out by the students with no support, encouragement, or participation from school officials or employees and as long as students do not pressure other students to participate.

D. Display of Religious Symbols

Just as the Establishment Clause prohibits officially school-sanctioned prayer as inappropriate public support for religious doctrine, so it prohibits the display of religious symbols in school for the purpose of advancing religious doctrine. The key question is whether particular religious symbols are displayed in a religious or secular manner.

In *Stone v. Graham*,[104] the United States Supreme Court struck down, under the Establishment Clause, a Kentucky statute that required the posting of the Ten Commandments in classrooms, explaining that the first four commandments (dealing with duties toward God) make the Ten Commandments a sacred text. The Court found that the statute had the purpose of inducing students to read, reflect on, and obey the Ten Commandments. It regarded as ineffective the following disclaimer required by the statute to appear on every copy of the document that was displayed in a classroom: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court concluded that this disclaimer did not change the underlying context of the document's display as a religious admonition rather than as material appropriately integrated into the school curriculum.

Determining whether a particular symbol is "religious" or is displayed in a religious manner can be difficult for a school official. For example,

---

[104] 449 U.S. 39 (1981).

in *Florey v. Sioux Falls School District 49-5*,[105] the Eighth Circuit Court of Appeals upheld a school board policy that permitted the use of religious symbols like crosses, Menorahs, crescents, Stars of David, crèches, and symbols of Native American religions–"provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." The court explained its decision within the framework of the three-part *Lemon* test. First, it said that the policy's secular purpose was to enhance students' knowledge of their religious and cultural heritage, rather than to promote religious doctrine. It noted that the Supreme Court had commented in *Schempp* that the Establishment Clause does not prohibit the study of religion "when presented objectively as part of a secular program of education."[106] Second, the court concluded that school personnel in fact carried out the policy to achieve the primary effect of improving students' appreciation of their heritage rather than to spread religious doctrine. Third, it determined that the policy minimized government entanglement with religion by providing administrators and teachers with guidelines for displaying religious symbols for secular purposes.

In *Lynch v. Donnelly*[107] the United States Supreme Court upheld the inclusion of a crèche in an annual municipal Christmas display. This decision lends support to the analysis used in *Florey*. Although the Court acknowledged "the religious significance of the crèche,"[108] it ruled that the city's practice of including a crèche in its display complied with the Establishment Clause. The Court explained that the secular context of the crèche–the celebration of the national holiday of Christmas–gave that display the secular purposes of "celebrat[ing] the Holiday and . . . depict[ing] the origins of that Holiday"[109] and made any benefit to Christianity "indirect, remote, and incidental."[110]

In analyzing the dispute in *Lynch*, the Court commented briefly about the use of religious symbols in public schools. Citing its earlier opinion in *Stone v. Graham*, the Court stressed that the context in which such symbols are displayed determines whether their display complies with the Establishment Clause. As the Court explained in *Stone*, the central issue is whether such symbols are displayed with religious purpose or effect or used as components of secular instruction about religion in secular courses like history, literature, and comparative religion.[111] Through both

---

[105] 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).
[106] 374 U.S. 203, 225 (1963).
[107] 465 U.S. 668 (1984).
[108] *Id.* at 687.
[109] *Id.* at 681.
[110] *Id.* at 683.
[111] 449 U.S. 39, 42 (1981).

its contents and its enforcement by school personnel, the policy challenged in *Florey* appears to have met the Supreme Court's requirement that the use of religious symbols be restricted to secular instruction about religion.

In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,[112] the United States Supreme Court applied its holding in *Lynch* to a case concerning religious symbols displayed in two public spaces in Pittsburgh. The Court ruled that displaying a forty-five-foot Christmas tree and an eighteen-foot Menorah during the December holiday season on a sidewalk in front of a city/county building managed by the city did not violate the Establishment Clause. It found that the context in which the symbols were set (i.e., they were symbols of holidays of different religions, and a sign posted next to the Christmas tree contained a statement by the mayor focusing on the secular theme of religious liberty represented by these symbols) demonstrated that they were displayed for the secular purpose of celebrating cultural diversity, and their primary effect was not to advance religion.

However, the Court also ruled that the display of a crèche in the county courthouse in Pittsburgh violated the Establishment Clause. In doing so, it again focused on the context of the display: the crèche was set in the "most public" part of the courthouse, surrounded by flowers, and included an angel carrying a banner that proclaimed "Gloria in Excelsis Deo!" The Court found that in light of its context, the crèche impermissibly expressed the county's apparent endorsement of the religious message of Christmas: the celebration of Jesus' birth.

In *Joki v. Board of Education of Schuylerville*,[113] decided in 1990 after *Allegheny*, plaintiffs sued to enjoin a school district from continuing to display a large painting with a religious theme in its high school auditorium. It had been painted on the wall in the 1960s by a student at the school. In its attempt to follow *Allegheny*, the district court reasoned that it must determine whether, taking into account the content and context of the painting, a reasonable observer would likely perceive the government action in displaying the painting as endorsement of Christianity.[114] It decided that the painting–which featured a man with a crown of thorns nailed to a Latin cross, an elderly bearded man holding stone tablets inscribed with Roman numerals from one to ten, and other easily recognizable Biblical figures–had an overtly Christian theme. Further, the painting was displayed permanently, not as part of a seasonal holiday display as in the *Lynch* and *Allegheny* cases. In addition, the painting,

---

[112] 492 U.S. 573 (1989).
[113] 745 F. Supp. 823 (N.D.N.Y. 1990).
[114] *Id.* at 827.

although undeniably student artistic expression, was not a part of a larger exhibit of student work. Instead, its size (ten feet by twelve feet) dwarfed two smaller pieces of student art that were hung in another part of the auditorium. Taking all these factors into consideration, the court concluded that because the average observer would believe the painting to be Jesus Christ at his crucifixion and because the painting lacked any meaningful neutralizing features (such as being part of a larger exhibit of student work and labeled as such), it had the effect of conveying a message of government endorsement of Christianity. The court ordered the school district to remove the painting.

In *Guyer v. School Board of Alachua County*,[115] a Florida court ruled that elementary school Halloween displays did not violate the Establishment Clause because the decorations were part of secular Halloween celebrations rather than symbols used to promote witchcraft as a religion. The court acknowledged that Halloween decorations are capable of conveying a religious message. However, it explained that the legal question is not whether the decorations *could* communicate a religious message but rather whether they did so in the actual context in which they were displayed. The court observed that the Halloween symbols (such as witches) were not singularly religious–as, for example, a Latin cross is. Also they were displayed along with such clearly secular symbols as pumpkins. As the court noted, a government practice does not violate the Establishment Clause simply because it happens to harmonize with the tenets of some or all religions. *Guyer* clearly illustrates the vital importance of context in deciding whether a particular practice complies with the Establishment Clause. Many aspects of curricular and extracurricular school life potentially could have sectarian religious significance that would violate the Establishment Clause. However, the mere potential for improper support of religious beliefs or practices does not violate the Establishment Clause. As the court stressed in *Guyer*, courts and school officials must carefully consider such potentially ambiguous school activities to determine whether they are religiously neutral or whether they improperly promote particular religious beliefs or practices. When activities are potentially ambiguous, teachers and school officials should make clear to students the religiously neutral instructional purposes of the activities.

---

[115] 634 So. 2d 806 (Fla. Dist. Ct. App. 1994), *rev. denied*, 641 So. 2d 1345 (Fla. 1994), *cert. denied*, 115 S. Ct. 634 (1994).

E. Holiday Observances

In *Florey v. Sioux Falls School District 49-5*,[116] the Eighth Circuit Court of Appeals also addressed a question closely related to the constitutionality of displaying religious symbols in public schools: the constitutionality of a school district's policy permitting public schools to observe holidays "which have a religious and a secular basis," expressly including Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. Observances included the singing of Christmas carols. Using the same three-part analysis it used to assess the constitutionality of the display of religious symbols, the court allowed the holiday observances to continue. It contrasted the secular goal of the policy with an example of an unconstitutional application of that policy: a Christmas quiz for kindergarten classes in which correct answers required students to acknowledge Jesus as their savior and to state that angels saluted his birth in song. In short, as with displaying religious symbols, an observance of religious holidays is constitutional if its purpose is to provide secular instruction about religious traditions, rather than to promote the religious beliefs associated with those holidays. As noted above, the court ruled in *Guyer v. School Board of Alachua County*[117] that the display of Halloween decorations involved in that case did not violate the Establishment Clause because the context of the decorations showed that they were part of a secular Halloween celebration rather than symbols used to promote witchcraft as a religion.

Another issue regarding religious holidays is the right of students to stay home to observe them. The Free Exercise Clause and RFRA generally guarantee this right. For example, a federal district court struck down a school board policy that limited the number of excused absences for religious reasons to two days, precluded credit for makeup work for unexcused absences, and required teachers to give students grades of zero for tests and daily graded work missed during unexcused absences.[118] A church and students, who were members of that church, sued the board on behalf of those students who sought to be excused from school for

---

[116] 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). The court sidestepped the question of whether Christmas carols are religious as well as cultural in contemporary America. Instead, it focused on the educational context of carol singing in the schools, observing that even if carols are religious, their secular, cultural significance justifies their inclusion in public school education. The court reasoned that when an activity serves a primarily secular purpose–such as contributing to secular instruction about American culture–the inclusion of religious content does not by itself make the activity unconstitutional.

[117] 634 So. 2d 806 (Fla. Ct. App. 1994).

[118] Church of God v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd per curiam*, 670 F.2d 46 (5th Cir. 1982).

eight to ten days to observe holidays recognized by their faith. The court ruled that the board's reasons for adopting the policy–enforcing regular attendance and the need to apply a policy uniformly to all students of all faiths–were not sufficiently compelling to override the students' right to exercise their faith. To accommodate the right of students to observe religious holidays, school officials should work with students and their parents to arrange for the children to make up work missed during religious holidays and should try to avoid scheduling examinations and other major events on religious holidays.

F. Distribution of Bibles and Other Religious Literature

Until 1978 courts around the nation unanimously vetoed the common practice of allowing representatives of outside groups like the Gideons to distribute Bibles to school children, holding that distribution of Bibles plainly serves the religious purpose of spreading Biblical doctrine to students, conveys the appearance of official support for these doctrines, and uses school facilities as the vehicle for distributing a religious text.[119] This unanimity was broken in *Meltzer v. Board of Public Instruction of Orange County*.[120] In that case, a school district had tinkered with its previously rejected policy in such a way as to allow the local Gideons simply to leave Bibles on a table for students to take if they wished. The United States Court of Appeals for the Fifth Circuit upheld the new policy without explanation in an equally divided decision. Thorough scrutiny under the three-part *Lemon* test would suggest that the policy fails all three parts: it serves a religious purpose of facilitating the dissemination of religious doctrine; it might appear to put the official stamp of approval on that doctrine; and it permits the use of school facilities to spread that doctrine. Nevertheless, the *Meltzer* decision shows that at least one court has tolerated the "passive" approach to Bible distribution. Before relying on that decision to authorize this method of Bible distribution, school officials should consider the legal consequences of such a practice. By opening a public school to Bible distribution by an

---

[119] Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954); Goodwin v. Cross County Sch. Dist., 394 F. Supp. 417 (E.D. Ark. 1973); Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. Ct. App. 1960). *See also* Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977). It is important to recognize that none of these decisions applies to private, nondisruptive distribution of religious literature by students during their free time in the school day. The Free Exercise and Free Speech Clauses and RFRA should protect such activity. Students who share such nonreligious literature as baseball cards, letters, recipes, newspapers, poems, and novels with one another should also be able to share religious literature.

[120] 577 F.2d 311 (5th Cir. 1978) (en banc) (per curiam), *cert. denied*, 439 U.S. 1089 (1979).

outside organization, the officials would thereby create a forum for distribution of literature (at least religious literature) by virtually all outside groups. They could not lawfully open school doors to the Bible while closing them to other–perhaps more controversial–kinds of literature.

More recently, another court has struck down the distribution of Bibles in a school classroom. In *Berger v. Rensselaer Central School Corp.*,[121] two students challenged a school system policy that permitted members of the Gideons to distribute Bibles to fifth graders in school facilities during the school day. The Bibles contained only the New Testament and Psalms and Proverbs–not the rest of the Old Testament. The Seventh Circuit Court of Appeals held that the Christian group did not have a free speech right to distribute Bibles to captive students who must attend school. The court explained that the school district had violated the Establishment Clause by providing the Gideons with buildings and a captive audience of students who were attending school under a compulsory attendance law.

In their desire to avoid violating the Establishment Clause, school officials may find that they have run afoul of other provisions of the First Amendment. A 1989 Illinois case[122] illustrates that a school district's attempt to ban Bible distribution on school property can, in certain very limited circumstances, violate an outsider's right of free speech. In the case before it, the court held that high school officials could not prohibit distribution of Bibles on a sidewalk on school property that fronted onto a busy, four-lane street because the sidewalk, having been used without restriction by pedestrians other than high school students, was a public forum. This case focused court attention on the only part of school property that could be found to be a public forum, given the right circumstances. Other locations, like the sidewalk leading to the front door of the school and the school parking lot,[123] are not public forums, and school officials may forbid outsiders to distribute literature, including Bibles, in these locations.

Similarly, school officials must be aware of the First Amendment implications of policies that regulate distribution of literature, including religious literature, by students. The complex topic of regulating the distribution of religious materials by students goes beyond the scope of this book. However, two cases are worth noting here with respect to distribution of religious materials by students. Both cases involved distribution

---

[121] 982 F.2d 1160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993), *reversing* 766 F. Supp. 696 (N.D. Ind. 1991).

[122] Bacon v. Bradley-Bourbonnais High Sch. Dist., 707 F. Supp. 1005 (C.D. Ill. 1989).

[123] United States v. Kokinda, 497 U.S. 720 (1990); Grattan v. Board of Sch. Comm'rs, 805 F.2d 1160 (4th Cir. 1986).

of a Christian publication called *Issues and Answers*. In *Rivera v. East Otero School District R-1*,[124] a federal district court in Colorado struck down a policy that prohibited distribution by students of written materials that promoted a specific religious or political belief, along with any materials that were commercial, obscene, or libelous. The court ruled that students had a free speech right to distribute *Issues and Answers* unless school officials could prove that banning the publication was necessary to prevent disruption of official school activities.

In 1993, in *Hedges v. Wauconda Community Unit School District No. 118*,[125] the Seventh Circuit Court of Appeals upheld a policy that regulated rather than prohibited the distribution of religious literature by students. The policy regulated only distribution of more than ten copies on a single day or subsequent days. It required twenty-four-hour prior notice of distribution to the principal and limited the time and place of distribution. The controversial part of the policy regulated the contents of materials: it banned several categories of materials, including materials that express religious beliefs that would reasonably seem to be endorsed by school officials. This prohibition applied, for example, to the Bible and prayers. The policy also banned materials written by nonstudents.

The Seventh Circuit ruled that the time and place restrictions were reasonable. After finding that the school was a nonpublic forum, the court also held that the board's prohibition against materials written by outsiders was a reasonable rule with the legitimate pedagogical goal of requiring students to express their own beliefs in their own words. In dictum (that is, discussion by the court that was not necessary for the court to decide the case and therefore is not binding as precedent in future cases), the court criticized the prohibition against distribution of religious literature. School administrators should note that the policy banned only distribution of religious material that appeared to convey official endorsement of the content of the material, and it applied only to mass distribution–more than ten copies. The ten-copy rule appears to be a sensible way to prevent confusion among students about official endorsement because mass distributions normally seem more official in nature. Also, students were allowed to distribute any number of copies of material that was clearly identified as their personal views.

G. Conclusion

The Supreme Court's early opinions about devotional activities in public school in *Engel* and *Schempp* initially appeared clear and deci-

---

[124] 721 F. Supp. 1189 (D. Colo. 1989).
[125] 9 F.3d 1295 (7th Cir. 1993).

sive. Regardless of public opinion about the wisdom of those decisions, at least they seemed to establish comprehensible guidelines about the question of school prayer. However, inconsistencies have developed in judicial review of other school religious activities since those decisions. Courts in some cases strictly scrutinize practices in order to enforce the Establishment Clause vigorously. In other cases courts seem willing to permit considerable government accommodation of religious activity. The three-part *Lemon* test is helpful, but judicial manipulation of the test occasionally undermines its value.

Beyond the *Lemon* test, a few analytic themes emerge from the cases discussed in this section. (1) Courts examine the purpose and implementation of activities. They sometimes have given passing constitutional grades to activities with religious content when the content was instituted and executed in genuinely secular contexts (e.g., activities designed for historical, literary, or cultural instruction). (2) Courts address the question of whether practices are religious or have been deemed by judicial fiat to be sapped of their religious significance and thereby transformed into traditional secular customs (e.g., holiday observances). (3) Courts focus on the relation of religious activities to the regular school routine. Activities connected to the regular school day generally have failed constitutional challenge (e.g., school prayer), while practices independent of the normal school day often have survived challenges (e.g., student extracurricular clubs and gatherings with no relation to the official curricular or extracurricular program). (4) Although the Supreme Court has plainly ruled that whether a religious practice is voluntary is not relevant to whether the practice violates the Establishment Clause, some courts–even the Supreme Court itself in *Lee v. Weisman*–that have considered the constitutionality of graduation prayer nonetheless have cited the voluntary or coercive nature of such prayer in a particular case as a significant factor in their decisions under the Establishment Clause.

CHAPTER 3

RELIGIOUS OBJECTIONS TO SECULAR ACTIVITIES

Sometimes students object on religious grounds to secular school activities. Thus far, they have done so under the Free Exercise Clause, contending that participating in particular activities–like reciting the pledge of allegiance–would conflict with their religious beliefs. In these cases, courts have used the free exercise analysis discussed earlier to weigh the school's interest in the activities against the students' interest in practicing their faith, to consider whether the school could offer the students reasonably available alternative activities, and to consider whether the students have a right to be excused from the challenged activity. For example, in *West Virginia Board of Education v. Barnette*,[126] the United States Supreme Court ruled that a student whose Jehovah's Witness faith prohibited saluting the flag had a free exercise right to be excused from the flag salute.[127] In *Florey*, discussed above in chapter 2, section E with respect to observance of religious holidays, the Eighth Circuit stated that a student who objects on religious grounds to a school's secular observance of a religious holiday has a free exercise right to be excused from participating in it.

In its 1992 decision in *Sherman v. Consolidated School District 21 of Wheeling Township*,[128] the Seventh Circuit Court of Appeals upheld an Illinois statute that provided for the voluntary daily recitation of the pledge of allegiance in publicly supported elementary schools. The court ruled that the statute did not violate the Free Exercise Clause because recitation of the pledge was voluntary. The statute did not violate the Establishment Clause because reciting the pledge is not a religious exercise. Rather, it is "a patriotic or ceremonial occasion," similar to the recitation of historical documents or the singing of patriotic anthems that include references to God. The Seventh Circuit's decision in *Sherman* is consistent with other cases that have upheld the use of prayers as invocations at legislative sessions and the national motto of "In God We Trust." Although a purely logical interpretation of such practices clearly suggests that they are indeed religious practices and appear to violate the Establishment Clause, the courts have nevertheless concluded that the practices have merely "ceremonial" significance and that history has drained the religious references of genuine religious meaning.

---

[126] 319 U.S. 624 (1943).

[127] After *Barnette*, other courts ruled that the Free Speech Clause of the First Amendment secures to students the right not to stand during the flag salute. *See* Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973).

[128] 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

CHAPTER 4

RELIGION AND THE CURRICULUM

In considering religion and the public schools, a core question is the role of religion in instruction and instructional materials for school curriculums.[129] Controversy over religion in the curriculum reflects an underlying tension between two basic principles of school law. First, the law vests school officials with control over curriculum, including–the United States Supreme Court says–material designed to promote community values.[130] But second, in order to protect the rights of individual students and parents, the First Amendment limits officials' authority over curriculum.[131]

This section will study the limits imposed by the First Amendment on the role of religion in the public school curriculum by examining the application of First Amendment principles to the three situations in which the issue typically arises: (1) controversy related to courses about religion or religious segments of otherwise secular courses; (2) opposition from some elements of the religious community to instruction about certain topics–specifically, evolution and sex education–in the secular curriculum; and (3) religious objections to the use of secular instructional materials or methods.[132]

A. Courses or Course Segments About Religion

The primary forms in which religion appears in the curriculum are courses about religion (such as Bible study and comparative religion) and secular courses (such as history or literature) that contain units about religious topics. The Supreme Court set the framework for constitutional analysis of instruction about religion in public schools in *Illinois ex rel. McCollum v. Board of Education*[133] and *School District of Abington Town-*

---

[129] Conflicts over the role of religion in the curriculum have generated controversy. *See, e.g., Bible Study Classes Provoke Hot Dispute*, THE NEWS AND OBSERVER (Raleigh, N.C.), Sept. 18, 1983, at 1; *Group Questions Schools' Bible Classes*, THE CHARLOTTE OBSERVER, Sept. 8, 1983, at 1; and *Religion in the Classroom Getting New Attention*, THE CHARLOTTE OBSERVER, Dec. 20, 1982, at 1.

[130] Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982); Ambach v. Norwick, 441 U.S. 68, 76 (1979); Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

[131] *Pico*, 457 U.S. at 870; *Epperson*, 393 U.S. at 104; West Virginia Bd. of Educ. v. Barnette, 319 U.S. 642 (1943).

[132] *See generally* WARREN A. NORD, RELIGION AND AMERICAN EDUCATION (1995), for an insightful, probing, and comprehensive analysis of the role of instruction about religion in the public school curriculum.

[133] 333 U.S. 203 (1948).

ship v. Schempp.[134] In *McCollum* the Court ruled that a program of religious instruction in the public schools of Champaign, Illinois, violated the Establishment Clause. Under the program, a local interfaith religious council hired teachers (usually members of the clergy) to give weekly religious instruction to public school students for thirty minutes during the school day in regular classrooms. Protestant, Catholic, and Jewish students were taught separately by teachers of their respective faiths. This instruction was given at no cost to the school district but was subject to the superintendent's approval and supervision. The program included an excusal policy: students who chose not to receive religious instruction left their classrooms to pursue secular studies elsewhere in the building. The Court held that this program violated the Establishment Clause because it employed both the force of the state's compulsory education law and public buildings to aid religious groups by providing pupils and facilities where the groups could disseminate religious beliefs.[135] (In a later case,[136] the Court held that a released-time program that permitted public school students to leave school during regular hours for private, off-campus religious training did not violate the Establishment Clause.)

The Supreme Court refined the holding of *McCollum* in *Schempp*, declaring that the Establishment Clause forbids sectarian, indoctrinating instruction about religion in public schools but permits instruction concerning religion in a secular, objective, nonindoctrinating manner:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[137]

---

[134] 374 U.S. 203 (1963).

[135] *McCollum*, 333 U.S. 203, 212 (1948).

[136] Zorach v. Clauson, 343 U.S. 306 (1952). *But see* Doe v. Shenandoah County Sch., 737 F. Supp. 913 (W.D. Va. 1990) [granting a temporary restraining order (a) to prevent members of a private religious organization from entering the school and attempting to recruit students for off-campus religious classes, and (b) to prevent the same group from conducting the classes a few feet from the elementary school in buses closely resembling those used by the school itself].

[137] 374 U.S. 203, 225 (1963).

Thus *McCollum* and *Schempp* establish the ground rules for courses about religion. The Establishment Clause permits neutral, secular instruction about religion but forbids sectarian, indoctrinating teaching of religion. Lower courts have applied this analysis in several cases. The decisions show that courts will permit courses about religion, but only if certain criteria of form and content are satisfied to keep instruction secular rather than sectarian. The most illuminating judicial review of religion courses came in a series of three decisions by a federal district court in *Wiley v. Franklin*.[138] In those discussions, in addressing challenges by parents and students, the court thoroughly probed the form and content of Bible study courses in public elementary schools in Chattanooga and Hamilton County, Tennessee. The *Wiley* trilogy offers a helpful lesson in the constitutional principles governing religion courses.

In the first *Wiley* decision *(Wiley I)*, the court ruled that the courses–similar to the program struck down in *McCollum*–violated the Establishment Clause. They had been sponsored since 1922 by a voluntary citizens' group called the Public School Bible Study Committee, whose membership consisted principally of members of evangelical Protestant churches. Local churches donated money to the committee, and local clergy and lay church leaders played active parts in managing the committee. The committee raised funds for and paid Bible teachers' salaries and also hired, trained, and assigned teachers. The only fixed standard for selection as a teacher was a record of previous Bible study; certification was not required. Although the committee denied that it required teachers to espouse religious faith, the committee director asked applicants whether they had a "love of God." Local school officials retained authority to supervise and remove teachers. Classes were taught at each grade level for thirty minutes every week in classrooms other than the students' regular classroom. The courses were given as electives; students were enrolled only with written parental consent. To avoid singling out students who did not elect to take the courses, only half of the students who chose to do so could enroll in a given semester, thereby ensuring that students who did not take the course stayed with the other half of their classmates in a regular classroom.

The Bible Study Committee prepared the curriculum, subject to approval by school officials. The stated objectives of the program were to acquaint students with major Bible characters and stories, with the Bible's contributions to history, literature, art, and music, and with the Bible's role in shaping cultural values. Sample lesson titles included:

---

[138] 468 F. Supp. 133 (E.D. Tenn. 1979) (*Wiley I*); 474 F. Supp. 525 (E.D. Tenn. 1980) (*Wiley II*); 497 F. Supp. 390 (E.D. Tenn. 1980) (*Wiley III*).

> First Grade: The Bible: How It Came to Be; The Creation: Part I; The Creation: Part II; Noah; Abraham: Journeys to Canaan; Abraham: Journey into Egypt; Jesus and the Ten Lepers and/or Jesus and the Paralytic; The Feeding of 5,000; Family Relationships.
>
> Fourth Grade: The Bible: Archaeology, Geography, etc.; Deborah and Barak; Gideon; Saul Becomes King; Saul and the Amalekites; David Anointed King; David and Goliath; The Crucifixion; The Resurrection; Commitment to One's Beliefs.

As for teaching methods, the teachers described their goal as letting the Bible "speak for itself." They stressed Biblical storytelling as "the hallmark of classroom instruction." They avoided mere recitation of Bible passages, personal avowals of faith, comments about the beliefs of others, and Biblical interpretation or criticism. Although the Bible Study Committee did not mandate the use of a particular version of the Bible, teachers generally used the King James version of the Old and New Testaments.

The court focused on the form of the program in striking it down under the Establishment Clause. Applying the three-part test, the court concluded that (1) the committee's control over the curriculum and selection, training, payment, assignment, and supervision of teachers showed that the program had a religious purpose of promoting Christian beliefs; (2) it advanced Christianity over other faiths; and (3) it unduly entangled school officials in the committee's work. In addition, the committee director's inquiry of teacher applicants whether they loved God violated the Supreme Court's prohibition in an earlier case[139] of tests of faith as a condition of public employment.

The court further concluded that the program's content also violated the Establishment Clause in two ways. First, some lesson titles appeared to stress religious themes over secular instruction. Second, the philosophy of letting the Bible "speak for itself," without selecting or interpreting passages for secular educational reasons, actually promoted the fundamentalist approach of reading the Bible literally.

In contrast to its ruling in regard to the Establishment Clause, the court found that the program complied with the Free Exercise Clause. It decided that the facts that (a) the program was elective and required parents' written consent and (b) only half the children were allowed to take the course at any one time adequately protected children from being or feeling coerced into taking the courses.

---

[139] Torcaso v. Watkins, 367 U.S. 488 (1961).

To correct the constitutional flaws in the program's form, the court ordered school officials to establish uniform standards for hiring teachers; to exclude profession of religious faith as a condition of employment; and to vest school officials with exclusive control over the hiring, training, assignment, and supervision of teachers and curriculum. The court declared that the Establishment Clause did not bar school officials from accepting funds for the program from the Bible Study Committee or other private sources. To remedy constitutional deficiencies in the program's content, the court directed school officials to revise the curriculum, to eliminate all lesson titles whose only reasonable interpretation and message is a religious message and which lessons cannot reasonably be taught within the confines of a secular course in history, literature, or other secular subject normally included within or recognized as suitable for an elementary school curriculum.[140]

School officials then redesigned the Bible study program within the court's guidelines, and the court reviewed their efforts in *Wiley II*. With respect to teachers' qualifications, the court approved their proposal to establish qualifications as to college degree, elementary school certification, and training in Bible literature while rejecting a proposal to authorize the hiring of some teachers with inferior qualifications (for example, teachers who had no college degree and were not certified to teach elementary school). The court approved school officials' assumption of exclusive control over the hiring, training, assignment, and supervision of teachers; it also suggested that a teacher-training program include instruction to teachers about the Free Exercise and Establishment Clauses.

Turning to the revised curriculum, the court studied the proposed new lesson titles. For example, the sample first- and fourth-grade lesson plans quoted above were changed as follows:

> First Grade: The Bible: From Scrolls to Printed Page; Narratives of the Beginning: Earth, Sun, Moon, Stars, Animals, and Man; Adam and Eve in the Garden of Eden; Abraham; Lot, Sodom, and Gomorrah; Belshazzar's Feast; Jesus and the Ten Lepers/Jesus and the Paralytic; Jesus and the Gerasene Swine; The Prodigal Son.
>
> Fourth Grade: The Bible: Influence on Sciences; Deborah and Barak; Gideon; David the Musician; David and Jonathan; David As King; Jesus Crucified Between Two Thieves; Reports of the Resurrected Jesus; The Stoning of Stephen.

---

[140] 468 F. Supp. at 152.

The court concluded that each lesson could be taught for its secular value, without religious emphasis, except for the fourth-grade lesson entitled "Reports of the Resurrected Jesus." That lesson, the court ruled, would necessarily deal in a religious way with "the central statement of the Christian religious faith"[141] and could not be taught in a secular manner.[142] With respect to teaching methods, the court directed officials to ensure that classes avoid endorsement or criticism of specific beliefs and instead deal only with the objective, nonindoctrinating study of the Bible's relation to history, literature, art, music, and social customs.

In *Wiley III*, the court probed yet further into the content of the curriculum, reviewing tapes of six actual classes. Three lessons covered the stories and historical significance of the battle of Jericho, the establishment of the kingdom of Israel under Saul, and the meaning of "parable" by reference to the New Testament parable of the talents and one of Aesop's fables. Three other lessons dealt with God's punishment of the Babylonian King Belshazzar; God's threat to destroy the Israelites for their worship of the golden calf; and stories of Abraham, including God's promise to Abraham and his descendants of perpetual dominion over Canaan and the destruction of Sodom and Gomorrah for their wickedness.

The court found that the first three lessons were properly confined to nondevotional instruction in Biblical history and literature, given with secular intent and neither advancing nor inhibiting religion as their primary effect. Thus the first three lessons hewed closely to the principles of secular instruction about religion set forth in *Schempp*, in compliance with the Establishment Clause. In contrast, the court found, the other three lessons improperly were intended to convey religious messages rather than literary or historical messages, and their primary effect was to promote religious doctrine rather than to convey Biblical history or literature in a secular fashion. They ran afoul of the Establishment Clause by divorcing religion from any secular context and treating Bible stories of divine miracles as factual, historical accounts.

Although the *Wiley* trilogy represents the most intensive judicial review of public school religion courses, other decisions are relevant. Comparisons among these cases can enhance school officials' grasp of the constitutional principles to govern the courses. The Fifth Circuit Court of Appeals addressed a parent's challenge to an elective Bible literature course in a public high

---

[141] 474 F. Supp. at 531.

[142] Although instruction about New Testament reports of Jesus' resurrection plainly creates a risk of indoctrination, it would appear that the court was unduly pessimistic about whether students could be taught about the resurrection story and its role in Christianity and Western culture–or, for that matter, about any alleged religious miracle–without either endorsing or criticizing its factual truth.

school in Conecuh County, Alabama.[143] The court observed that the textbook for the course followed a fundamentalist Christian approach to Bible study without any discussion of the Bible's secular value. It also noted that the teacher, an ordained Baptist minister and a qualified literature teacher, gave examinations that stressed rote memorization from the Bible. In view of these facts, the court found that the course failed the second part of the three-part Establishment Clause test in that the promotion of fundamentalist Christian beliefs would be its primary effect.

In *Vaughn v. Reed,*[144] a federal court considered a challenge to a program of religious instruction conducted in certain public elementary schools in Martinsville, Virginia, since 1942. The form of that program resembled the one struck down in *Wiley I*–a private religious group hired and paid instructors to teach religion to third, fourth, and fifth graders in regular classrooms each week for one hour during the school day. The program had an excusal procedure that permitted students who did not wish to take such instruction to attend study hall.

Following the *McCollum* decision, the court held that the program violated the Establishment Clause because of the private group's control over the hiring, payment, and supervision of teachers and the use of public facilities for religious indoctrination. Whereas the court in *Wiley I* approved the excusal policy in that case, the court in *Vaughn* found that the excusal policy itself was evidence that the course was given as religious indoctrination. It did not review the content of the course but merely directed school officials to follow the guidelines of *Schempp* by avoiding promotion of sectarian beliefs.

In *Crockett v. Sorenson,*[145] a Bible study program offered to fourth and fifth graders in Bristol, Virginia, foundered on the Establishment Clause. A group of local Protestant ministers hired, paid, and supervised teachers and designed the curriculum. School officials exercised no control over the classes except to monitor attendance. Students attended the classes for forty-five minutes each week, receiving no grades or credit. An excusal policy permitted children who chose not to attend the classes to go to study hall or to a physical education class. Until 1982 the curriculum called for Bible teaching, prayer, and hymns; then prayers and hymns were deleted, leaving a program of Bible instruction and nondevotional music.

As the court had done in *Wiley III,* the federal district court in *Crockett* viewed videotapes of the classes and concluded that the lessons were presented objectively in a manner appropriate for the grade levels, without any efforts to indoctrinate students in the tenets of a particular faith. Echoing the position of the Supreme Court in *Schempp*, the *Crockett* court noted

---

[143] Hall v. Board of Sch. Comm'rs, 656 F.2d 999 (5th Cir. 1981).
[144] 313 F. Supp. 431 (W.D. Va. 1970).
[145] 568 F. Supp. 1422 (Va. 1983).

the importance of knowing the Bible in studying art, music, literature, and culture–from appreciating the Last Supper and the *Messiah* to reading *Moby Dick* and understanding the Biblical sources of common terms in our culture. But it found that the control exercised by the ministers had made the courses a state-sponsored religious program that violated the Establishment Clause. Parting ways with the *Vaughn* court and joining with the *Wiley I* court, the *Crockett* court endorsed the elective nature of the program. It observed that even if the course were to shed all trappings of religious education and become fully secular in form and content, requiring a student whose faith forbids even the neutral study of religion to participate in the classes would violate his right to free exercise of his faith.

The court counseled school officials to redesign the program along the following lines. (1) School officials should exercise exclusive control over the program, including personnel matters, curriculum, and textbooks. (2) Officials should hire only certified teachers and should not require profession of religious faith as a condition of employment. (3) Teachers must teach objectively, without seeking to indoctrinate students. (4) The course should continue as an elective, but students should be offered legitimate academic classes as alternatives. (5) Officials may accept contributions to the program from private sources, if the funds come with no conditions regarding the form or content of the program.

In *Doe v. Human*,[146] a federal district court in Arkansas ruled that a school district violated the Establishment Clause by offering voluntary Christian Bible classes in elementary schools. The classes were taught by lay people. Ninety-six percent of the students attended these classes. Other children went to the library, received tutoring, or engaged in other instructional activities. The court ruled that these classes violated the Establishment Clause under *McCollum*. Although the curriculum for the classes included some secular content designed to help promote good character development by students, it also included clear and explicit endorsement of Christian beliefs.

School officials can draw important lessons from these cases. With respect to content, the Establishment Clause permits instruction *about* religion for secular educational purposes, even though materials that convey religious messages may be used in the instruction. The *Wiley* cases demonstrate both the difficulty of designing a curriculum that will comply with the Establishment Clause and the lengths to which courts may go to scrutinize a curriculum. Consider the teaching of Greek mythology as a useful analogy. A teacher in a modern American school could instruct students about Greek myths from the perspectives of literature,

---

[146] 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd mem.*, 923 F.2d 857 (8th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

art, history, and comparative religion without endorsing or criticizing the religious beliefs or views of history expressed by the myths. A public school religion teacher should instruct about the Bible or modern Western religions in the same nonindoctrinating way. The important difference, of course, is that many or most teachers and students in American public schools are adherents of Western religions, and it is therefore both vital and challenging for teachers to instruct in a nonindoctrinating manner about beliefs and practices that are sometimes cherished and sometimes controversial among teachers and students.

The same principles govern instruction about pertinent religious issues as units of secular courses, such as history, art, music, or literature. For example, religion plainly would be relevant to a course about colonial American history. However, such instruction must pertain directly to a secular purpose. The study of the role of religion in colonial America does not open the door to instruction about unrelated religious topics or to religious indoctrination.

With respect to form, courts consistently have struck down programs controlled by private groups in terms of hiring, training, supervising, and assigning teachers and selecting curriculum and textbooks. Courts also prohibit profession of faith as a prerequisite for teachers' employment.

Two issues of form remain unsettled: the elective nature of religion courses and the propriety of private funding of such courses. The *Wiley, Crockett*, and *Vaughn* decisions show that courts have differed on whether the courses should be offered as electives or, if at all, as required courses. The *Wiley* and *Crockett* holdings, which insist that such courses be elective, appear most faithful to the dictates of the Free Exercise Clause. As the *Crockett* court observed, the Free Exercise Clause protects people from compulsory participation in secular as well as religious activities that impair their exercise of religious faith– for example, flag salutes and military conscription. In the same vein, even if a religion course is conducted as a neutral, secular activity, the Free Exercise Clause and RFRA should shield a child whose faith opposes such treatment of religion from required attendance of the course.[147]

---

[147] While a policy of excusal from religion courses may be constitutionally required in order to protect the free exercise rights of some students, it is important to consider the potentially limited scope of a student's right to excusal from public school activities. There might well be circumstances in which excusal would excessively interfere with a student's education. Exemption from a course peripheral to public school instruction, such as Bible study, would not significantly do so. *See, e.g.*, Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (granting exemption from public school ROTC course on religious grounds); but exemption from an entire course or substantial segments of a course more central to the educational purpose of public schools, such as science or history, could jeopardize the quality of a student's education. In such instances, a court might rule that the state's interest in educating a child outweighs the burden on the child's religious beliefs. At that point, a parent's only remedy would be either to enroll the child in a private school with a curriculum more in harmony with the family's faith or to provide home instruction. For a full discussion of this issue concerning objections to secular materials or methods of instruction, *see* ch. 4, sec. C.

As to funding, the courts in *Wiley* and *Crockett* ruled that the Establishment Clause does not bar private funding of religion courses. The *Crockett* court cautioned that such funding may be accepted only with "no strings attached" regarding the form or content of the courses. Despite these judicial blessings of private funding, school officials should consider that such funding might create the appearance of doctrinal support by religious groups. School units that choose to accept private donations for religion courses should heed the warning in *Crockett* and adopt policies that insulate the courses from any influence by donors.

Roberts v. Madigan[148] illustrates a type of situation that often presents a difficult challenge to school officials: a teacher's use, in a secular course or activity, of religious material that is challenged as indoctrinating. In *Roberts* the Tenth Circuit Court of Appeals upheld the decision of school officials to prohibit a fifth-grade teacher from reading the Bible in the presence of students during silent reading periods, to direct the teacher to remove two books on Christianity from the classroom library, and to prevent the teacher from displaying a religious poster. The court ruled that the school officials did not violate the Establishment Clause. They had a secular purpose of preventing the teacher from setting a sectarian, Christian tone in the classroom. The officials' decision did not advance or inhibit religious beliefs or practices as its primary effect. Specifically, even though the classroom library included books on Greek myths and Navajo religion, the problem with the teacher's conduct was that he used the Christian books in an indoctrinating way. Finally, the court also ruled that the Free Speech Clause would not shield the teacher's conduct, since the teacher's apparent endorsement of Christianity was inappropriate during official school activities, such as classroom curricular activities. *Roberts* provides a useful illustration of the importance of context in analyzing cases under the Establishment Clause. The school officials and the Tenth Circuit focused on the entire atmosphere created by the teacher, not merely on particular acts taken by him.

B. Religious Objections to Secular Courses

1. Evolution and Creationism

Controversies over religious objections to secular courses generally have focused on two topics–evolution and sex education. The conflict over instruction about the Darwinian and Biblical accounts of the origin of human beings has taken several forms: efforts to prohibit the teaching of evolution, measures to require teachers or textbooks that discuss evolution to give "equal treatment" to the Biblical account, and attempts to

[148] 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

require teachers who instruct about evolution to disclaim it as "mere" theory rather than scientific fact. Analysis of these disputes calls for a grasp of the dynamic relationship between the Establishment and Free Exercise Clauses.

Efforts to prohibit the teaching of evolution captured nationwide attention in 1927 through the "monkey trial"–*Scopes v. State*.[149] In that case, a teacher was convicted at trial of violating a Tennessee statute by teaching about evolution. His conviction was appealed to the Tennessee Supreme Court, which reversed it because of a technicality but upheld the law's constitutionality. Not until 1968, in *Epperson v. Arkansas*,[150] did the United States Supreme Court finally and decisively address the constitutionality of statutes that prohibit teaching about evolution. In *Epperson* the Court held that an Arkansas statute that prohibited instruction about evolution in public schools violated the Establishment Clause because it imprinted a government stamp of fundamentalist doctrine on public school education, thereby promoting such doctrine. As the Court observed,

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[151]

The Court then explained, "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[152]

In *Wright v. Houston Independent School District*,[153] a group of parents and students sought to prohibit the teaching of evolution through a court injunction rather than by statute. However, the federal district court ruled that *Epperson* bars a court, as well as a legislature, from prohibiting instruction about evolution. To avoid the force of *Epperson*, the plaintiffs put a novel twist on the debate, arguing that teaching the theory of evolution establishes a religion of "secular humanism," in violation of the Establishment and Free Exercise Clauses. Their view–that the neutral, value-free treatment of religiously sensitive issues in secular courses

---

[149] 154 Tenn. 105, 289 S.W. 363 (1927).
[150] 393 U.S. 97 (1968).
[151] *Id.* at 103 (footnote omitted).
[152] *Id.* at 106.
[153] 366 F. Supp. 1208 (S.D. Tex. 1972).

is a basic tenet of an atheistic, relativistic faith that they called "secular humanism"–is a keystone of contemporary religious challenges to secular education.

The court rejected the plaintiffs' argument. Analyzing their contention under the three-part Establishment Clause test, it ruled that teaching about evolution does not serve a religious purpose, promote religious beliefs, or unduly entangle government in religion. It further explained, "Science and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers . . . . Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise."[154] The court also rejected the plaintiffs' alternative proposal for an injunction directing teachers who instruct about evolution to give equal time to the Biblical account of creation. Commenting that a court is not qualified to strike a balance among the many views of human origins held by various faiths, it termed the proposal an "impractical, unworkable and ineffective" remedy. Finally, the court disagreed with the plaintiffs' position that instruction about evolution violates the free exercise rights of students whose religious faith endorses creationism. The free exercise rights of such students, the court ruled, can be protected adequately by an excusal policy that exempts them from instruction about evolution.

While the *Wright* court rejected a balanced-treatment proposal as impractical, a federal district court in *McLean v. Arkansas Board of Education*[155] examined the idea more deeply to find theoretical flaws in a statute that mandated balanced treatment of evolution and "creation science." Scientific creationism, the court explained, was first promoted by fundamentalist groups in the 1960s; that school of thought is based on the view that scientific evidence supports the Biblical view of the creation of the universe and the origin of man. Assessing the statute under the three-part Establishment Clause test, the court first found that the law had the impermissible purpose of endorsing religious doctrine. In reaching this conclusion, the court examined the religious motivation of the law's sponsors. It also studied the statute's content, concluding that scientific creationism is a theory designed to support the Biblical account of creation and the origin of man, even though its proponents often avoid express reference to God or the Bible.

The court also found that by requiring instruction about religious doctrines, the statute advanced religion. Examining evidence that is said to support the scientific status of scientific creationism, the court deter-

---

[154] *Id.* at 1211.

[155] 529 F. Supp. 1255 (E.D. Ark. 1982).

62

mined that creation science, as defined by the statute, is not a genuine scientific theory–and therefore lacks secular educational value–because its principles fail to satisfy the basic criteria of scientific theory: (1) guidance by natural law; (2) reference to natural law to explain phenomena; and (3) the offering of tentative hypotheses subject to empirical verification. Since instruction in creation science would advance religious doctrine without serving secular educational goals, the court ruled that it would fail the second prong of the Establishment Clause (*Lemon*) test in that advancement of religion would be its primary effect. In accord with the *Wright* decision, the court ruled that the theory of evolution is a scientific theory rather than a religious doctrine, and instruction about evolution therefore does not violate the Establishment Clause.

Finally, the *McLean* court held that the Arkansas statute failed the third part of the *Lemon* test by unduly entangling school officials in religion. Such entanglement, the court noted, would stem from the impossibility of designing a balanced-treatment curriculum while avoiding reference to religion.

The United States Supreme Court struck down a Louisiana balanced-treatment statute in *Edwards v. Aguillard.*[156] The avowed purpose of the statute was to protect academic freedom. It required a conditional type of balanced treatment: teachers need not instruct students about human origins, but if they teach either evolution or creation science, they must also teach the other theory. The law also required that both explanations of human origins be taught as theories rather than as proven scientific facts.

The Supreme Court found that several aspects of the history and contents of the statute demonstrated that it failed the first prong of the *Lemon* test because it lacked a clearly secular purpose. First, the Court studied the long history of the debate over public school instruction about human origins and the legislative history of the Louisiana law and concluded that the statute was another effort by adherents of creationism to promote their own beliefs and to oppose the theory of evolution because it conflicts with their beliefs. Second, the Court found that creation science is a religious doctrine. In reaching this conclusion, the Court did not adopt the *McLean* court's approach of scrutinizing the legitimacy of creation science as a scientific theory. Rather, it examined the definition of creation science given by the statute's supporters and determined that the theory includes the religious belief that a supernatural being created the human species. The Court then ruled that since creation science is a religious doctrine, the Establishment Clause forbids a state to promote it, whether by prohibiting any public school instruction about evolution (as

[156] 482 U.S. 578 (1987).

did the statutes involved in *Scopes* and *Epperson*) or by conditioning instruction about evolution on a balanced treatment of creation science.

Another strategy for opposing the teaching of evolution has been to require teachers and textbooks to qualify evolution as mere theory rather than as proven fact. The Sixth Circuit Court of Appeals addressed the constitutionality of a Tennessee statute that required biology textbooks (a) to give equal treatment to evolution and the Biblical account of creation and the origin of man, and (b) expressly to label the concept of evolution as mere theory.[157] Significantly, the statute exempted the creation story in the Book of Genesis from such a disclaimer. The court ruled that the combined effect of the equal-treatment and disclaimer requirements violated the Establishment Clause by giving the Biblical version a preferential position over scientific theories of human origin.[158]

In *Webster v. New Lenox School District No. 122*,[159] the Seventh Circuit Court of Appeals upheld a school district's decision to prohibit a junior high school social studies teacher (not a science teacher) from advocating creation science and other religious positions. The district had declared that the teacher could objectively discuss the history of church/state relations and could objectively teach about nonevolutionary theories of the origin of species. As the court explained, a school board has the power to control the curriculum, as long as it does not impose a "pall of orthodoxy" over the entire curriculum or wrongly prohibit teachers from mentioning relevant material.

Similarly, in *Peloza v. Capistrano Unified School District*,[160] the Ninth Circuit Court of Appeals ruled in favor of school officials in a California school district who had given a written reprimand to a high school biology teacher who allegedly had taught creationism in class, had identified himself as a creationist to his students, had told his students that he did not believe in the theory of evolution, and had discussed his Christian beliefs with students in school. The reprimand ordered the teacher to cease proselytizing in his class, to follow the prescribed biology curriculum (which included teaching about evolution), to stop teaching creationism as a legitimate scientific theory, and to cease quoting from the Bible in class. The reprimand directed the teacher to refer students who asked him religious questions in school to their parents or to members of the

---

[157] Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975).

[158] The court also ruled that the Establishment Clause barred a provision of the statute that excluded "occult" or "Satanical" beliefs from religious beliefs entitled to balanced treatment and left the Genesis account of creation potentially as the sole religious account so entitled. Such distinctions among religious views, the court ruled, would cause excessive government entanglement with religion.

[159] 917 F.2d 1004 (7th Cir. 1990).

[160] 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2640 (1994).

clergy. The court explained that the reprimand did not violate the Establishment Clause because, contrary to the teacher's contention, the theory of evolution is a valid scientific theory rather than a secular humanist religious belief. The court ruled that the reprimand's prohibition against the teacher's discussing his religious beliefs with students during the school day–either in or out of class–did not violate his free speech rights because the school district had a compelling interest in ensuring that the teacher did not engage in actual or reasonably perceived religious indoctrination of students in violation of the Establishment Clause.

As these decisions show, the case law governing the controversy over evolution and creationism in the public school curriculum exhibits striking consistency. Beginning with *Epperson,* courts uniformly have rejected attempts to exclude the theory of evolution from the curriculum or to dilute it. They have regarded such efforts as intrusions into the curriculum that are prompted by religious motives, in violation of the Establishment Clause. Although *Epperson* and *Aguillard* together forbid legislatures and school boards to either mandate instruction about creation science or prohibit instruction about evolution, teachers probably have some degree of academic freedom in teaching about human origins: they may discuss problems in the theory of evolution from a secular, scientific perspective and probably may discuss creationism objectively as a view of human origins in which some people believe and historically have believed.[161] However, *Aguillard* appears to prohibit a teacher–as an agent of the state–from placing creationism (or creation science) on a par with the theory of evolution as a plausible scientific account of human origins.

A key feature of these cases is the firm distinction drawn between scientific theory and religious doctrine, a distinction that merits further discussion. As noted above, opponents of instruction about evolution often charge that the theory of evolution is a tenet of an atheistic faith of secular humanism. At first glance, this view appears to gain support from the Supreme Court's comment in *Schempp* that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion 'thus, preferring those who believe in no religion over those who do believe.'"[162] However, the Court's statement prohibits only indoctrination about atheism through public instruction; it does not bar the teaching of secular theories merely because they conflict with particular religious doctrines. As the Supreme Court stated in *Epperson,*

---

[161] But academic freedom would not entitle a teacher to refuse for religious reasons to teach about evolution in defiance of a curriculum adopted by his superiors. *See* Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

[162] 374 U.S. 203, 225 (1963) (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

five years after *Schempp*, the First Amendment "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma."[163] In short, the fact of conflict between secular and religious views on the same issue does not by itself transform the secular theory into religious doctrine.[164]

Although the Establishment Clause shields instruction about evolution from religious opposition, the Free Exercise Clause should alert school officials to the serious, genuine concerns of some parents and students who believe that exposure to such instruction could undermine a student's religious faith. As noted in *Crockett*, the secular nature of a topic does not insulate it from conflicts with students' free exercise rights. An appropriate remedy for students who do not wish to learn about evolution because of their religious beliefs, as the court suggested in *Wright*, might be an excusal policy that exempts them from classes that teach about evolution.

2. Sex Education

Litigation concerning sex education courses generally has taken the form of lawsuits in which parents, students, or taxpayers seek court injunctions against the courses. The results follow the pattern of the evolution cases: courts have held that the Establishment Clause protects the courses from such opposition and that excusal policies adequately pro-

---

[163] 393 U.S. 97, 106-7 (1968).

[164] *See also* Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980). A number of decisions that define "religion" under the First Amendment support this view. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165-66, 176 (1965) (religion means a "sincere and meaningful [belief that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God," a belief "based upon a power or a being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent"); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (per curiam) (Adams, J., concurring) (religion generally entails belief in ultimate truths about comprehensive issues in life, along with practice of symbolic rituals). Note that in *Seeger*, the Supreme Court ruled that religion, within the meaning of the First Amendment, can include an atheistic faith that plays a role in a person's life equivalent to the role served by theistic faith. Significantly, such definitions of religion do not include science, an enterprise with the purpose of understanding patterns among observable phenomena by reference to natural principles. Of course, a teacher conceivably could use the theory of evolution (or other secular theories) in an improper way to advance atheism and criticize major theistic religions by citing the theory of evolution as an example of a secular theory superior to Biblical views. Such a use of evolution as a weapon in the conflict between atheism and theism would violate the prohibition suggested in *Schempp* against the establishment of secular humanism as a religion.

tect the free exercise rights of students who oppose the courses for religious reasons.[165]

Citizens for Parental Rights v. San Mateo County Board of Education[166] is a representative and instructive case. A group of parents brought suit to enjoin the implementation of family life and sex education programs by five local school districts. The programs had excusal policies that exempted students who opposed the courses. The plaintiffs challenged the program on several grounds, including the Free Exercise and Establishment Clauses. The court held in favor of the school districts. In response to the plaintiffs' contention that the courses violated their children's free exercise rights by coercing them to learn about sexual matters in ways that conflict with their religious beliefs, the court stated that the Establishment Clause, as interpreted in *Epperson*, prohibits school officials from tailoring instruction to anyone's particular religious doctrine. To enjoin sex education, as the plaintiffs requested, would enshrine the plaintiffs' faith as law by using the court to ensure that the public school curriculum conforms to their beliefs. The court concluded that an excusal policy would adequately protect the free exercise rights of parents and students who oppose sex education for religious reasons.

The court also rejected an Establishment Clause argument analogous to the contentions about evolution that were rejected in *Wright* and *McLean*: that the sex education program would establish secular humanist religious beliefs concerning morality, family life, and reproduction that are hostile to the plaintiffs' religious beliefs. In response, the court observed that the sex education curriculum treated these topics neutrally, from the viewpoint of public health, without advocating any opinions

---

[165] Smith v. Ricci, 89 N.J. 514, 446 A.2d 501, *appeal dismissed*, 459 U.S. 962 (1982); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976); Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970). In Ware v. Valley Stream High Sch. Dist., 75 N.Y.S.2d 114, 550 N.E.2d 420 (1989), members of the Plymouth Brethren, a small Protestant denomination, sought to have their children exempted from instruction about AIDS, asserting that such instruction violated their free exercise rights. The Court of Appeals of New York reversed summary judgment in favor of the school board and returned the case to the lower court for a determination of the burden the AIDS curriculum imposed on the plaintiffs' religious beliefs and whether the state's compelling interest in educating youth against AIDS would be adversely affected by exempting the plaintiffs from the AIDS curriculum. Courts in two cases have reached opposite conclusions on the legality of programs that make condoms available to middle school and high school students. Alfonso v. Fernandez, 195 App. Div. 2d 46, 606 N.Y.S.2d 259 (1993) (striking down the program), *leave to appeal dismissed*, 83 N.Y.2d 906, 637 N.E.2d 279 (1994); Curtis v. School Comm. of Falmouth, 420 Mass. 749, 652 N.E.2d 580 (1995) (upholding the program), *cert. denied*, 116 S. Ct. 753 (1996).

[166] 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976).

about them. In fact, the curriculum directed teachers to refer students to their parents for specific advice and instruction. The court explained that the mere clash between secular sex education and the plaintiffs' religious beliefs does not convert the secular program into a state-supported religious doctrine in violation of the Establishment Clause.

C. Religious Objections to Secular Instructional Materials and Methods

In some cases, parents and taxpayers have objected for religious reasons to the use of secular instructional materials or methods rather than to the subject matter of courses. Most of these cases have involved objections made under the Free Exercise Clause. Courts have generally applied to these cases the same analysis they have adopted for considering religious objections to secular courses, finding that the Free Exercise Clause may give the student the right to be excused from using the material or method in question. The use of secular materials or methods that conflict with beliefs of a particular religious faith does not violate the Establishment Clause; however, the Free Exercise Clause or, more recently, RFRA may give a student the right to be excused from exposure to the material or method in question.

A review of suits brought under the Free Exercise Clause shows that students around the nation have raised religious objections to a variety of instructional materials and methods, including the use of certain texts or other books,[167] the use of instructional movies,[168] the wearing of particular clothing in physical education classes,[169] and coeducational dancing in physical education class.[170] The central issue in such cases is the scope of a student's excusal right. Since the Free Exercise Clause and RFRA require both a balancing of the government's interest in a particular policy or practice against the student's religious faith and a determination of whether the government could fulfill its interests through alternative policies that impose less of a burden on a person's faith, each case must be considered individually. Nevertheless, an examination of case law on this issue reveals some general principles that school officials can follow in order to comply with the Free Exercise Clause and RFRA.

---

[167] Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985). Mozert v. Hawkins County Pub. Sch., 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

[168] Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

[169] Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979); Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).

[170] Hardwick v. Board of Sch. Trustees, 54 Cal. App. 696, 205 P. 49 (Cal. Ct. App. 1921).

First, school officials should try to avoid unnecessary conflicts between the school's educational interests and the student's rights by considering whether an alternative material or method that could achieve the same educational goal is reasonably available. For example, in *Grove v. Mead School District No. 354*,[171] a teacher followed this approach by permitting the objector to read a different book from the one being challenged. In a case in which a student objected on religious grounds to having to wear a particular uniform in physical education class, the Alabama Supreme Court ruled that school officials honored her free exercise right by permitting her to wear different clothing.[172]

However, situations may arise in which no alternative material or method is available, or in which an available alternative is so expensive or administratively burdensome that it would be unreasonable to require school officials to offer it to a student. In such cases, officials should consider whether to excuse the student entirely from the unit, subject, or activity in question. In responding to such situations, officials should take into account the importance of the challenged material or method, whether the student's challenge pertains to a peripheral or core course, and the administrative feasibility of excusal.

In some cases a challenged material or method might play such a minor, supplemental role in instruction that some form of excusal from classes in which that material or method is used would be appropriate, even if no other comparable material or method is available for the student. For example, in *Davis v. Page*,[173] a student requested the right under the Free Exercise Clause to leave the classroom when instructional films were shown. A federal district court found that films were used in numerous courses and that the administrative burden school officials would face in supervising excused students would be excessive. Instead, the court upheld the officials' decision to offer a limited excusal right:

---

[171] 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

[172] Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962). *But see* Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995), in which a court upheld a teacher's refusal to let a ninth-grader write a research paper about Jesus. Although the facts mentioned by the court suggest that the student was tardy in proposing that topic, the court's decision also includes questionable analysis supporting a teacher's authority to prohibit a student from writing a paper about a religious topic even where religion otherwise seems to be an appropriate topic in terms of the assignment.

[173] The court also ruled that students who object have a free exercise right to leave the classroom when a teacher shows "entertainment" films rather than "instructional" films.

though students who object will have to remain in the classroom, they need not watch the films.[174]

Even if the challenged material or method plays an important role in teaching and no alternative is reasonably available, excusal might be appropriate if the course or unit involved is peripheral to the curriculum. For example, in *Grove* the teacher permitted the student who objected to leave the classroom during discussion of the single contested novel.[175]

The most challenging cases involve religious objections by students to materials or methods used throughout a course or unit that plays an integral role in the curriculum. In such cases, it can be difficult to strike a proper balance between the student's free exercise and RFRA rights and the school officials' interest in providing a sound education. The case of *Mozert v. Hawkins County Public Schools*[176] illustrates the problems school officials can face in these situations. In *Mozert*, a group of fundamentalist Christian parents and students in Tennessee sued the school board in federal district court, contending that the required use of a particular reading series violated their right to free exercise of religion because the books promoted ideas and values they found objectionable on religious grounds. They asked the court to order the school board to provide the students with alternative texts.

As instructed by a federal appellate court, the district court judge analyzed the case by addressing three questions: (1) whether the parents and children had sincere religious beliefs; (2) whether mandatory use of the readers burdened the plaintiffs' exercise of their faith; and (3) whether mandatory use of the series was the least restrictive way in which the school board could fulfill its interest in teaching all students to read proficiently. The judge found that the plaintiffs had sincere religious beliefs. He also agreed with the plaintiffs that the required use of the challenged texts burdened their exercise of their faith by forcibly exposing the children to ideas and values offensive to their religion. The judge then concluded that the school board's task of providing sound reading education for all children did not require uniform use of the challenged reading series, noting that the state-approved list of reading texts authorized school

---

[174] *See also* Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (suggesting that school authorities could accommodate a student's religious objection to taking a coeducational physical education class with "immodestly" dressed members of the opposite sex by exempting the student from the class); Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962) (suggesting that school officials could accommodate a student's religious objection to taking part in particular physical education exercises by excusing the student from those exercises).

[175] 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

[176] 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

boards to use other readers and that Tennessee law authorized private school and home instruction without the use of that series.

In fashioning a remedy, however, the judge did not grant the plaintiffs' request that the school board be ordered to provide alternative reading classes with different texts. He explained that such a remedy would impose undue educational and administrative hardship on the school system and might violate the Establishment Clause by tailoring reading instruction to the plaintiffs' religious beliefs. To accommodate the plaintiffs' rights and the school board's interests, the judge decreed the following resolution to the dispute. The plaintiff students would have a choice of remaining in standard reading classes in the public schools and using the challenged texts or leaving the reading classes entirely and studying reading privately outside public school; students who opted out would go to the library or study hall during reading class and would take standardized tests periodically to permit school officials to follow their reading development.

The Sixth Circuit Court of Appeals reversed the district court judge's compromise solution. The three appellate judges differed slightly in their written analyses of the case; but they shared the view that while the Free Exercise Clause forbids public officials to coerce people to affirm ideas that conflict with their religious beliefs, it does not protect people from mere exposure to such beliefs. One judge also noted a practical factor in the school board's favor: the Hawkins County elementary school curriculum is designed to integrate reading instruction into other teaching throughout the day–for example, by using stories from the reading texts in teaching other subjects. The district judge's opt-out remedy would undermine such educationally valuable integration. Although the appeals court freed the Hawkins County school board from the district court's ruling, its decisions would not prevent a board from voluntarily adopting such opt-out procedures as a way to accommodate students' religious beliefs. If it is educationally and administratively feasible to sever a course or unit from the rest of the curriculum for private or home instruction, a school board may still permit students who object to opt out of the course or unit. But it should be noted that the district court's approach in *Mozert* would not be appropriate with some methods or materials used in key courses or units. For example, a school board might consider it educationally unsound to sever some courses (such as mathematics or social studies) or units (such as units about the United States Constitution) from the curriculum. Also, standardized tests–cited by the district judge in *Mozert* as tools to monitor the progress of students who opt out of reading class–are not available at some grade levels for some subjects. When an opt-out solution would not be feasible, the school board's interest in

providing a sound education to all public school students–including the very students who challenge materials or methods on religious grounds–might well outweigh the free exercise and RFRA rights of parents and students who insist on *Mozert*-style excusal arrangements. In such cases, the Free Exercise Clause should not preclude school officials from refusing an opt-out request. The only option left to such parents and students would be full-time private schooling or home instruction acceptable to their faith.

Although most litigation about religious objections to materials or methods have involved only the Free Exercise Clause, four interesting cases illustrate a different strategy used by some students and parents: challenging the materials or methods under the Establishment Clause. In these cases, the challengers have argued that the materials or methods in question violated the Establishment Clause by promoting secular humanist beliefs.

In *Fleischfresser v. Directors of School District 200*[177] and *Brown v. Woodland Joint Unified School District*,[178] courts have rejected Establishment Clause challenges to the use of the Impressions Reading Series in elementary schools. The plaintiffs in these cases objected to the series' inclusion of readings by such authors as A. A. Milne, C. S. Lewis, Dr. Seuss, Ray Bradbury, L. Frank Baum, and Maurice Sendak. The plaintiffs contended that the series fostered an anti-Christian religious view that favored the supernatural, witchcraft, and paganism. In *Fleischfresser*, the Seventh Circuit Court of Appeals explained that the series did not establish a religion, that any religious themes in the series were too amorphous to regard as a distinct religious view. It ruled that the use of the series had the secular purposes of developing reading skill and instilling creativity and imagination in children. The court found that the use of the series did not have the primary effect on average students of either advancing or inhibiting religious beliefs. It observed that only a small number of stories in the series were challenged as offensive and also explained that the mere harmony between a government action (here, the school district's use of the series) and the tenets of some religions does not transform the government practice into a religious practice that violates the Establishment Clause. Any religious references in the series, the court concluded, were secondary or trivial. It also found that the use of the series did not involve undue entanglement between government and religion. The court in *Brown* expressly approved of the Seventh Circuit's reasoning in *Fleischfresser*.

---

[177] 15 F.3d 680 (7th Cir. 1994).
[178] 27 F.3d 1373 (9th Cir. 1994).

The *Fleischfresser* court also rejected the plaintiffs' contention that the required use of the series violated the free exercise right of objecting parents to control the education of their children. It concluded that the required use of the series did not violate the parents' free exercise rights because the school district had not coerced the parents in any manner with respect to their own education of their children. Even if the use of the series imposed a burden on the parents, the court ruled, the district's interest in developing reading skills outweighed that burden. On this point the court quoted from the Supreme Court's 1948 opinion in *McCollum v. Board of Education*: "If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public education in shreds."[179]

In *Grove v. Mead School District No. 354*,[180] the Ninth Circuit Court of Appeals rejected a challenge by taxpayers and a parent to the use of a particular novel–*The Learning Tree*–in an English literature curriculum for high school sophomores. The novel depicts life from the perspective of a teenage boy in a working-class Black family. A student and her mother told the teacher that the book was offensive to their fundamentalist Christian faith and asked that the book be removed from the curriculum. As discussed above, the teacher refused their request, but she permitted the girl to read another book. The teacher also allowed her to leave the classroom while the class discussed the novel, though she decided to remain.

The girl's mother and associates sued the school district and argued in court that the use of the book violated the Establishment Clause by promoting antireligious secular humanist values, thereby breaching the government's duty to act neutrally toward religion. The appeals court disagreed, pointing out that the book was religiously neutral and was used in class in a religiously neutral fashion. A thoughtful concurring opinion illuminates the court's Establishment Clause analysis. First, the concurring judge rejected the underlying premise of the challengers' argument: that all ideas are either religious or antireligious. Some ideas, he maintained, fall within a third category of secular, nonreligious thought. Second, even if a book promotes or criticizes particular religious beliefs, that fact does not by itself determine whether study of the book violates the Establishment Clause. Rather, the key question is whether the teacher uses the book in a way that endorses or criticizes religious beliefs.[181] As the judge observed,

---

[179] 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

[180] 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

[181] This focus on the instructional context of an activity follows the contextual analysis used in Lynch v. Donnelly, 465 U.S. 668 (1984), and Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

> [I]nclusion of *The Learning Tree* as representative of a particular literary genre neither religiously inhibits nor instills, but simply informs and educates students on a particular social outlook forged in the crucible of black rural life. To include the work no more communicates governmental endorsement of the author's or characters' religious views than to assign *Paradise Lost*, *Pilgrim's Progress*, or *The Divine Comedy* conveys endorsement or approval of Milton's, Bunyan's, or Dante's Christianity.[182]

An even broader Establishment Clause challenge failed in *Smith v. Board of School Commissioners of Mobile County*.[183] The plaintiffs in *Smith* contended that (a) forty-four particular history, social studies, and home economics textbooks promoted secular humanism as a religious faith; and therefore (b) their use in the Alabama public schools violated the Establishment Clause. The federal district court agreed with them and banned the books from Alabama classrooms. The district judge found that secular humanism is a religion and that the books promoted it either by affirmatively supporting its views or by systematically omitting discussion of theistic religion.

As the district judge pointed out, secular humanism indeed exists as an ideology with an official organization (the American Humanist Association) and official statements of its tenets (Humanist Manifesto I, written in 1933; Humanist Manifesto II, written in 1973; and the Secular Humanist Declaration, written in 1981). The Secular Humanist Declaration characterizes secular humanism as a belief system that is religiously skeptical and is independent of faith in divine purpose in the universe. The court's finding that secular humanism is a religion draws some support from other court decisions[184] and from the characterization of secular humanism as a religion by the first Humanist Manifesto. Moreover, some statements and sections in the challenged home economics textbooks concerning education about values (such as the relative nature of values and the importance of a student's developing his own personal value system) correspond to tenets of secular humanism.

However, as the Eleventh Circuit Court of Appeals later noted, mere congruence between a nonreligious view and a religious belief does not

---

[182] 753 F.2d at 1540-41.

[183] 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

[184] Torcaso v. Watkins, 367 U.S. 488, n.11 (1961); Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring).

automatically transform the nonreligious view into a religious belief.[185] For example, the fact that our homicide law and the Ten Commandments both prohibit unjustified killing does not convert the homicide law into a religious doctrine, since the homicide law also rests on our society's secular abhorrence of unjustified killing. Similarly, although the theory of evolution and a relativist theory of moral values are supported by secular humanism, a person could agree with both of those theories without being a secular humanist (for example, these theories are fully consistent with religious humanism). In short, the Eleventh Circuit held that the district court in *Smith* was mistaken in concluding that the challenged home economics textbooks were secular humanist books on the basis of mere correspondence between some portions of the books and some tenets of secular humanism.

The second part of the district court's determination–that the omission of reference to theistic religion in the challenged history, social studies, and home economics texts violates the Establishment Clause–also poses an interesting dilemma. For instance, one of the challenged social studies textbooks is a second-grade book that discusses the Pilgrims' settlement of Plymouth as an example of building a community. The book does not mention the Pilgrims' reasons for leaving England, the central role of religion in their community, or the religious purpose of their Thanksgiving feast. Knowing these facts is important to understanding the nature of the Pilgrims' community (though perhaps not necessary to understanding the general concept of a community). They can be discussed objectively as matters of history, without endorsing or criticizing the Pilgrims' religious beliefs or practices. At some point excision of religion from a textbook–when neutral, nonindoctrinating discussion of religion is plainly relevant to an objective treatment of a subject–might violate the Establishment Clause, not necessarily by promoting the faith of secular humanism but simply by conveying hostility toward theistic religion.[186]

The appeals court reversed the district judge's decision in *Smith*. It assumed–for the sake of argument only–that secular humanism is a religion but then found that use of the disputed home economics texts does not promote secular humanism as its primary effect. Rather, the court observed, the books promote "such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making." Although these values might be consistent with tenets of secular humanism, the court applied the principle discussed above:

---

[185] Smith v. Board of Sch. Comm'rs of Mobile, 827 F.2d 684 (1987) (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

[186] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

mere consistency between a nonreligious view and a religious belief does not convert the nonreligious view into a religious belief. The court concluded that the home economics books are neutral rather than hostile toward religion.

As for the history and social studies texts, the appeals court ruled that the mere absence of a more thorough treatment of religion's role in American history and culture does not convey either endorsement of secular humanism or disapproval of theistic religions. It also found that school officials selected these books for adequate nonreligious reasons, such as overall relevance to the curriculum or quality of writing. Further, the court pointed out that teachers remain free to use other materials to supplement the textbooks' treatment of religion. The court concluded that even if the textbooks are educationally inadequate, their educational flaws do not render them constitutionally deficient under the Establishment Clause.

D. Conclusion

In the realm of First Amendment case law, court decisions governing the role of religion in public school curriculum exhibit general consistency and offer school officials relatively clear guidance. The Establishment Clause permits any instruction–including instruction about the controversial topics of religion, evolution, and sex education–that, by virtue of its form and content, serves secular educational goals. But the Establishment Clause forbids instruction or the tailoring of instruction with the purpose or primary effect of instilling religious beliefs in children. Although the Free Exercise Clause and RFRA might protect parents and students who oppose secular instruction in some cases, their sole remedy under those provisions would be partial or total exemption from the courses, not abolition or dilution of the courses.

CHAPTER 5
RELIGIOUS ACTIVITY BY PERSONNEL

A. Prayer or Private Study

As discussed above, a teacher or other public school employee may not organize or participate in prayer by students during the curricular or extracurricular school day. Still, it is uncertain whether a school employee may pray or read religious literature, either alone or with other employees, on school grounds during the school day. Although no cases have addressed this issue, it would seem that such activity is constitutional as long as it does not interfere with official school activities. That is, school officials may limit it to free periods during which employees have no official duties or during which they are permitted to engage in activities of their own choosing, such as reading or reflection, and to activities that do not disrupt students or other employees. One case from Indiana has addressed the related issue of prayer meetings held by groups of employees on school grounds during the school day.[187] The Seventh Circuit Court of Appeals upheld a school board policy prohibiting twenty-minute weekly prayer meetings conducted by employees in a guidance office before their official duties began. Although the court acknowledged that school administrators allowed employees to hold isolated, informal conversations at school (the types of conversations that "occur in any workplace"), it concluded that the prayer meetings were different because they were formal, organized, regular meetings. The court explained, "[A] private conversation has a different significance from a regularly scheduled group meeting devoted to a particular subject . . . . A public employer does not, by permitting its employees to use their lunch breaks or coffee breaks or other down time during the workday to talk to each other, turn over its premises to the employees for organized and scheduled meetings on topics unrelated to work."[188] While the court did not require the board to prohibit the prayer meetings, it upheld the board's policy to ban them.

The court's decision seems to be incorrect. It wrongly focused on the regular nature of the meetings, thereby missing the sole pertinent issue: the unofficial nature of the sessions. By permitting employees to discuss other issues during free periods, school administrators had opened up the school as either a designated public forum or a limited public forum for unofficial, nondisruptive employee discussions. The subject of such dis-

---

[187] May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7th Cir. 1985).
[188] *Id.* at 1110.

cussions–movies, sports, recipes, or religion–is irrelevant. Furthermore, since the meetings were unofficial and closed to students, they could not reasonably be interpreted as signaling the school's endorsement of religion in violation of the Establishment Clause. By prohibiting the meetings, the school board infringed on the free exercise and RFRA rights of the employees and violated their rights to freedom of speech by singling out only religious speech for prohibition. The Free Speech Clause probably permits employees to hold prayer meetings during free periods as long as the meetings are voluntary, unofficial, and nondisruptive.[189]

B. Discussion of Religion with Students

Occasionally, a teacher may want to discuss religion with a student on school grounds during the school day. Previous sections have already indicated that a teacher may not organize or participate in student religious activities on school grounds during the school day, but a teacher may discuss religion in a neutral manner (neither endorsing nor criticizing particular religious beliefs) when religion is relevant to secular school activities. For example, a student's question in a literature class may warrant a teacher's explanation of a religious allusion in a novel or poem. A teacher could even mention his or her own religious beliefs if such mention is relevant to an official activity and is done in a neutral manner. For example, a Jewish teacher's faith could be relevant to a discussion of the Holocaust in a history class, and a teacher's religious practices could be relevant to a neutral discussion of religious holiday observances. In such instances, teachers should take care to explain to students that references to religion or to religious faith are not intended to endorse or criticize any religious beliefs.

However, the Establishment Clause plainly prohibits teachers from using their position to proselytize among students or otherwise to endorse or criticize religious beliefs. For example, a court in New York upheld a school board's dismissal of a high school teacher who used his classroom during the school day to proselytize students, to encourage them to read the Bible, to recruit students for his religious group, and to

---

[189] *See, e.g.*, Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist., 777 F.2d 1046 (5th Cir. 1985) (holding that school employees have a free speech right to discuss labor matters informally during nonclass school hours), *rehearing denied*, 784 F.2d 1113 (5th Cir.), *aff'd*, 479 U.S. 801 (1986).

urge them to disregard their parents' wishes about religion.[190] As discussed earlier, the Seventh Circuit Court of Appeals upheld a school district's decision to prohibit a junior high school social studies teacher from advocating creation science and other religious views in class, where the district allowed the teacher to engage in objective discussions of the history of church/state relations and objective discussions about non-evolutionary theories of the origins of humans.[191] As also discussed above in chapter 4, section B.1, the Ninth Circuit Court of Appeals upheld a reprimand issued by school officials in a California district that ordered a high school biology teacher to stop proselytizing or even discussing religion with students in or out of class during the school day, to follow the biology and evolution curriculum (including teaching evolution as a legitimate scientific theory and not teaching creationism as a valid scientific theory), to stop quoting from the Bible in class, and to refer students with religious questions to their parents and members of the clergy.[192] The court ruled that the portions of the reprimand concerning instructions about evolution and creationism did not violate the Establishment Clause because evolution is a legitimate scientific theory, not a religious belief. The court upheld the prohibition against discussing religion with students on campus, explaining that the prohibition did not violate the Free Speech Clause because the school district had a compelling interest in preventing teachers from engaging in religious indoctrination of impressionable students. This prohibition against religious indoctrination is not limited to a teacher's classroom work. It applies to all activities in which any employee engages during the curricular and extracurricular school day on school grounds–that is, to all functions in which an employee acts or appears to act as an agent of the school board.

---

[190] La Rocca v. Board of Educ. of Rye City Sch. Dist., 63 App. Div. 2d 1019, 406 N.Y.S.2d 348 (N.Y. App. Div. 1978). *See also* Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918). In Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), a federal appellate court upheld a school board's order to a fifth-grade teacher to remove two sectarian books from the classroom library (the only books about religion in the library) and to refrain from reading the Bible–either alone or with students–during independent reading periods in class because these actions had the primary effect of advancing religion. The court upheld a lower court that ordered the board to return a missing Bible to the school library, finding that the presence of the Bible as one of a number of books about religion in the library did not violate the Establishment Clause.

[191] Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).

[192] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2640 (1995).

C. Wearing Religious Apparel or Religious Symbols

Whether teachers may wear distinctive religious clothing or religious symbols can be a sensitive and difficult personnel matter. Courts around the country have not reached consensus on this issue. One court held that a teacher may wear such garb or insignia.[193] Others have ruled that teachers may wear religious clothing or symbols unless such practice is prohibited by a statute or regulation as long as they do not inject their religious beliefs into instruction.[194] These courts have reasoned that such attire merely expresses the unobjectionable fact of a teacher's religious affiliation and does not, by itself, promote the teacher's religious beliefs. One court decided that a teacher may not wear such clothing or insignia, even in the absence of a prohibiting statute or regulation, because the daily presence in the classroom of a distinctively attired authority figure acts as a subtle but effective form of religious indoctrination.[195]

In 1987 the Oregon Supreme Court held that the Oregon statute specifically forbidding teachers to wear religious garb did not violate the Free Exercise Clause of either the State or Federal Constitution.[196] The court decided that the statute was permissible in order to avoid the appearance of sectarian influence, favoritism, or official approval in the public schools.

In 1990 the Third Circuit Court of Appeals considered whether the Pennsylvania statute forbidding teachers to wear any dress, mark, emblem, or insignia indicating the teacher's membership in a religious order, sect, or denomination violated title VII of the 1964 Civil Rights Act.[197] Title VII forbids employers to take adverse employment actions on the basis of, among other things, an employee's religion. But an employer is not required to accommodate an employee's religious practice if doing so would pose an undue hardship on the conduct of the employer's business. The Third Circuit Court reasoned that because the United States Supreme Court had dismissed the Oregon case for want of a substantial federal question, the Supreme Court must have concluded that the Oregon statute did not violate the Free Exercise Clause of the Federal

---

[193] State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940).

[194] Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936); Rawlings v. Butler, 290 S.W.2d 801 (Ky. Ct. App. 1956); Moore v. Board of Educ., 4 Ohio Misc. 257, 33 Ohio Op. 2d 406, 212 N.E.2d 833 (Ohio Ct. C.P. 1965). *See also* O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) (upholding state regulation prohibiting teachers from wearing religious apparel).

[195] Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

[196] Cooper v. Eugene Sch. Dist. No. 4J, 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed*, 480 U.S. 942 (1987).

[197] United States v. Board of Educ. of Phila., 911 F.2d 882 (3d Cir. 1990).

Constitution.[198] In order to reach that conclusion, the circuit court said, the Supreme Court must have reasoned that the ban on religious garb was permissible in order to advance a compelling interest in maintaining the appearance of religious neutrality in the classroom. The Third Circuit reasoned that requiring an employer to sacrifice a compelling state interest in order to accommodate an employee's religious belief would constitute an undue hardship. Therefore, the court said, Pennsylvania's refusal to accommodate the employee's religious practice did not violate title VII[199] or the Free Exercise Clause.

In *Mississippi Employment Security Commission v. McGlothin*,[200] decided in 1990, a school principal adopted a school dress code that forbade the wearing of headdresses or blue jeans. A school employee, McGlothin, refused to discontinue wearing a headwrap, asserting that her right to wear the wrap was protected by the First Amendment because it was an expression of her religious and cultural heritage. The Mississippi Supreme Court ruled five to four that the teacher's conduct was constitutionally protected religious expression under both the Mississippi and United States Constitutions. The United States Supreme Court refused to hear the case. Thus the Court has allowed a state statute forbidding religious dress to stand and has also allowed a state supreme court decision upholding a constitutional right to wear religious dress to stand.

McGlothin also brought a separate lawsuit in federal district court alleging that the school board violated her free exercise rights and title VII when it terminated her for wearing hairstyles and headwraps that violated the school dress code.[201] She claimed that she chose her attire as an expression of her religious beliefs but the school board terminated her without making any effort to accommodate her beliefs.

The court ruled that in order to prevail on her title VII claim (employment discrimination), McGlothin had to demonstrate that "(1) she had a bona fide religious belief that conflicted with an employment practice, (2) her employer had knowledge of her bona fide religious belief, and (3) some disciplinary action resulted from her failure to comply with the conflicting employment practice."[202] In order to prevail on her Free Exercise Clause claim, she would have to prove that her beliefs regarding headwraps and hair grooming were rooted in religion and sincerely held and that the school district's enforcement of the school dress code

---

[198] *Id.* at 889.
[199] *Id.* at 890.
[200] 556 So. 2d 324 (Miss. 1990), *cert. denied*, 498 U.S. 879 (1990).
[201] McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853 (S.D. Miss. 1992).
[202] *Id.* at 855 (citation omitted).

had a coercive effect that prevented her free exercise of those religious beliefs.

The court held that despite her claim to the contrary, McGlothin never informed the school district that her practices were of a religious nature. Instead, the record showed that at the time she was dismissed, she had spoken primarily of the cultural reasons for the headwraps and of her personal preference for the chosen styles. Although she had used the word "religious" in her discussions with school personnel, she admitted that the head covering was not required by her religion and spoke of "religion" only in general terms as "a way of life," which the school district understood to mean an expression of her African heritage.

Because the school district had not been informed of the religious nature of McGlothin's headwrap and hair style choices, the district court held that she could not prevail in her lawsuit. The school district could not be held liable for not accommodating McGlothin's "religious beliefs" when it was not aware that her religious beliefs were such that there was a need for accommodation.[203]

As these cases illustrate, the issue of whether teachers may wear religious apparel continues to be controversial, and the courts are divided on whether banning religious garb violates either the right to the free exercise of religion or title VII. Because the 1987 Oregon case was dismissed for want of a substantial federal question, the courts and legal commentators disagree on its precedential value.[204] Not all courts would have relied on that case as heavily as the Third Circuit did, especially since the United States Supreme Court declined to review the Mississippi Supreme Court's holding in *McGlothin*, thus allowing to stand the Mississippi decision that the teacher had a constitutional right to wear religious garb. The ruling of the federal district court in Mississippi recognized that a school district could be held liable for violating title VII and an employee's free exercise rights by placing restrictions on an employee's religious garb. But the court never reached the question of what type of reasonable accommodation was required, since it ruled that at the time the employee was dismissed the board was not aware of her religious motivation for her clothing choices. Until the Supreme Court writes an opinion on the issue, the constitutional question will remain open. Given the unsettled nature of the constitutional questions raised by a policy concerning religious garb, local school officials should consult their attorneys before adopting policies that regulate the wearing of such clothing.

---

[203] *Id.* at 866.

[204] United States v. Board of Educ. of Phila., 911 F.2d 882, 896-97 (3d Cir. 1990) (Judge Ackerman concurred in the judgment but disagreed with the majority reliance on *Cooper* without analyzing the full record of *Cooper*.)

D. Leave for Religious Reasons

The Free Exercise Clause, RFRA, and title VII of the Civil Rights Act of 1964[205] require school boards to make reasonable accommodations for employees' religious needs, including requests for religious leave. Although a board must make reasonable efforts to accommodate these requests, it need not incur undue hardship in order to do so.[206] No simple formula exists to guide school authorities in determining the scope of an employee's right to religious leave. Each case much be considered individually. However, a review of cases concerning this issue shows that courts have considered the following factors: whether the employee is seeking paid or unpaid leave, the amount of leave requested, the difficulty and expense of hiring a qualified substitute teacher, and the amount of leave available for other reasons. Courts generally have ruled in favor of teachers who request only unpaid leave. For example, the California Supreme Court struck down a school board's dismissal of an elementary school teacher who, as a member of the Worldwide Church of God, had requested from five to ten days of unpaid leave each year for three years in order to observe religious holidays.[207] Most of the absences fell on consecutive dates and the teacher prepared detailed lesson plans before each absence for use by substitute teachers. Neighboring school districts permitted such leave, and the number of days the teacher requested did not exceed the maximum amount of leave permitted by California law for illness or personal necessity. When the board denied his requests, the teacher took unauthorized leave. After he had accumulated thirty-one unexcused absences over the course of a few years, the board dismissed him. In reversing the board's action, the court found that in the circumstances of this case, the board would not have incurred undue hardship by honoring the teacher's requests.[208]

The law regarding requests for paid religious leave is not settled. The Tenth Circuit Court of Appeals upheld a school board policy that permitted teachers to take two days of paid leave each year for religious reasons (out of an annual total of twelve days of paid leave) and allowed them to take unpaid leave for additional religious holidays.[209] The teacher in this case sought only one additional day of paid religious leave (a total

---

[205] 42 U.S.C. § 2000e-2(a)(1) (1976).

[206] Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

[207] Rankin v. Commission on Professional Competence, 24 Cal. 3d 167, 154 Cal. Rptr. 907, 593 P.2d 852 (1979).

[208] *See also* Neiderhuber v. Camden County Voc. and Tech. Sch. Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980), *aff'd mem. on other grounds*, 671 F.2d 496 (3d Cir. 1981); Edwards v. School Bd., 483 F. Supp. 620 (W.D. Va. 1980), *vacated*, 658 F.2d 951 (4th Cir. 1981); Wangsness v. Watertown Sch. Dist. No. 14-4, 541 F. Supp. 332 (D.S.D. 1982).

[209] Pinsker v. Joint Dist. No. 285, 735 F.2d 388 (10th Cir. 1984).

of three days of paid religious leave). The court ruled that the economic impact of losing only a single day's pay was so minimal that it did not constitute such a substantial burden on the teacher's religious faith as to deny him his right to free exercise of religion. It did not require the board to accommodate the teacher's request for an additional day of paid leave.

In a case decided by the United States Supreme Court, *Ansonia Board of Education v. Philbrook*,[210] a teacher challenged a collective bargaining agreement that permitted teachers to take up to eighteen days of accumulated paid sick leave each year for certain purposes, with a maximum of three of those days for observance of religious holidays; teachers could take additional religious days as unpaid leave. The contract also permitted teachers to take up to three days of accumulated paid sick leave for "necessary personal business," though such days could not be used for purposes specifically authorized by the contract–including religious observances. The teacher requested approximately six days of paid leave each year to observe holy days of his faith, proposing two alternative plans. First, he suggested that the board allow him to use personal business leave for religious observance. As an alternative, he offered to pay the full cost of a substitute teacher for religious leave exceeding three days (less than the pay the teacher otherwise would forfeit), to supervise the substitute, and to make up for days missed by performing school work at other times. The board rejected both proposals. The Supreme Court ruled that while title VII requires an employer to make a reasonable accommodation to an employee's religious needs, it does not require an employer to adopt any specific reasonable accommodation (such as the specific accommodations proposed by Philbrook). The Court sent the case back to the federal district court to decide whether the leave provisions in the collective bargaining agreement offer a reasonable accommodation to Philbrook's needs or whether they discriminate in favor of secular use of "necessary personal business" leave against religious use of such leave. The Supreme Court offered the following general principles to the district court (and to employers, such as school boards): "[U]npaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. A provision for paid leave 'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.'"[211]

---

[210] 479 U.S. 60 (1986).

[211] *Id.* at 71 (quoting Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)). On remand, the district court held and the court of appeals affirmed that the collective bargaining agreement as administered did not discriminate on the basis of religion. Philbrook v. Ansonia Bd. of Educ., 925 F.2d 47 (2d Cir.), *cert. denied*, 501 U.S. 1218 (1991).

A careful review of the Supreme Court's decision in *Philbrook* suggests the following points: title VII probably would permit a school board to prohibit employees from taking any paid personal leave. But if a board allows some amount of paid leave, it must let employees use as much paid leave for religious purposes as it would let them use for similar secular purposes (such as attending meetings of secular organizations). Also, if a school board permits employees to take a specified number of days of paid leave without limiting the permitted purposes of such leave, it may not single out religious uses of such leave for prohibition. Once a board has accommodated employees' religious needs according to the provisions just stated, it probably can require employees to take any additional religious leave as unpaid leave.

The law is not clear on a board's authority to limit the number of days that may be taken for religious observances. It would seem that at some point a board could decide that a large amount of unpaid leave unduly interferes with an employee's duties.

CHAPTER 6

OTHER RELIGIOUS ACTIVITIES ON SCHOOL GROUNDS

A. Prayer at School Board Meetings

The United States Supreme Court has ruled that the Establishment Clause does not prohibit the offering of a prayer by a publicly paid chaplain as a daily invocation for a state legislature.[212] The Court explained that this type of prayer merely constitutes a traditional custom that neither proselytizes nor places the legislature's official seal of approval on particular religious beliefs. The Court's opinion makes it clear that the ruling applies not only to sessions of legislatures but also to meetings of "other deliberative public bodies."[213] School board meetings should fall within that category.[214]

B. Use of School Facilities by Outside Groups

Courts around the nation seem to be reaching a consensus on whether nonstudent religious groups have a right to use public school facilities for worship or other kinds of meetings. A school board may close its doors entirely to community groups, including religious groups; but if it permits one community group to use school facilities for meetings, the Free Speech Clause requires it to grant access on identical terms to other community groups, including religious groups. In other words, if a board allows political, social, or charitable community organizations to conduct meetings on school grounds, it must give the same right to religious groups.[215] As the courts have explained, allowing equal access has the valid secular purpose of enhancing community use of school facilities for the benefit of all residents.[216] Also, while granting access to religious groups undeniably benefits such groups, it does so only incidentally. An equal-access policy benefits all community groups generally, without singling out any particular group; a religious group would receive a

---

[212] Marsh v. Chambers, 463 U.S. 783 (1983).

[213] *Id.* at 786.

[214] The Court hinted, however, that prayer used to advance particular sectarian beliefs might violate the Establishment Clause. *Id.* at 794-95.

[215] Country Hills Christian Church v. Unified Sch. Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983). The Supreme Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), discussed in chapter 2, section B, supports this position. For a summary of earlier cases on this issue, *see* Annot. 79 A.L.R.2d 1148 (1961).

[216] Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 109, 389 A.2d 944, 954 (1978).

benefit without regard to its religious character.[217] Finally, use of school facilities by religious groups need not require entanglement by school officials other than the same clerical, security, and maintenance operations performed in connection with use by any other community group.[218]

In 1993 the United States Supreme Court addressed the use of facilities by outsiders. In *Lamb's Chapel v. Center Moriches Union Free School District*,[219] the Court ruled that a school board that rented its facilities to community groups that sometimes discussed family values during gatherings could not deny a church the use of school premises to show a film dealing with family values from a religious perspective.

The local school board, in accordance with state law in New York, allowed school facilities to be used by social, civic, recreational, and political organizations but not for religious purposes. An evangelical Christian church asked permission to use school facilities to show a six-part film series on Christian family values. When denied permission to show the film because it was church related, the church sued the school board.

The Supreme Court, using forum analysis (see chapter 1), concluded that even if the school was a nonpublic forum, the school board's action was unconstitutional. In a nonpublic forum, government officials may control access to a facility on the subject matter and identity of the speaker so long as the distinctions are reasonable in light of the forum's purpose and are viewpoint neutral. In this case, the board's refusal to rent school facilities for the film series was unconstitutional discrimination on the basis of viewpoint because the school's policy allowed the school to permit use of school property for the presentation of all views about family issues and child rearing *except* religious views of these subjects. The court also noted that allowing the film to be shown on school property would not violate the Establishment Clause under the test in *Lemon v. Kurtzman*.

---

[217] *Id.* at 111, 389 A.2d at 955; Country Hills Christian Church v. Unified Sch. Dist. No. 512, 560 F. Supp. 1207, 1218 (D. Kan. 1983); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959).

[218] Country Hills Christian Church v. Unified Sch. Dist. No. 512, 560 F. Supp. 1207, 1218 (D. Kan. 1983); *See also* Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990). *But see* Wallace v. Washoe County Sch. Dist., 701 F. Supp. 187 (D. Nev. 1988) (federal district court upheld a school district's refusal to permit a church to conduct services and Sunday school in a high school on a *permanent* basis. The court concluded that such permanent use of public school facilities would have the primary effect of advancing religion by creating the appearance of government support of the church). *See* ch. 2, sec. C.2 for a discussion of Shumway v. Albany County Sch. Dist. No. 1, 826 F. Supp. 1320 (D. Wyo. 1993); Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991); and Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991), cases involving rental of facilities for private baccalaureate services.

[219] 508 U.S. 384 (1993).

Thus a school system may not deny a church or religious group permission to use its facilities when the topic the group wants to discuss is one that is otherwise permissible in the forum. The Eighth Circuit Court of Appeals relied on this principle in *Good News/Good Sports Club v. School District of Ladue,*[220] striking down a school board policy that closed school facilities to all community groups, except the Scouts and athletic groups, between 3 p.m. and 6 p.m. on weekdays. The court agreed with a parent-initiated, parent-led religious group for students that the policy violated the Free Speech Clause by barring their group from meeting between 3 p.m. and 6 p.m. As the Supreme Court did in *Lamb's Chapel*, the Eighth Circuit identified the common subject matter of the Scouts and the religious group–moral development of children. Since the two groups dealt with the same subject matter, the court ruled, the Free Speech Clause prohibited the school board from favoring the Scouts over the religious group.

In 1994, the Fourth Circuit Court of Appeals held that the Fairfax County (Va.) school board violated the Federal Constitution by charging churches more to rent school facilities than it charged other nonprofit groups. Under school board policy, a church was charged the same rental fee as other nonprofit groups during the first five years it rented a facility. But during the fifth through the ninth year of rental, the rental rate was gradually increased until the rate was the same as the regular commercial rate, or five times the rate charged to other nonprofit groups. The Fourth Circuit held this practice to be discrimination against religious speech in violation of the First Amendment's Free Speech Clause and a violation of the church's right to the free exercise of religion. In effect, the court said, the board policy "moves the [s]chool [b]oard into a nonneutral, anti-religious corner by burdening free speech and the free exercise of religion."[221]

It is important to note an exception discussed by the Fourth Circuit to the general rule of equal treatment. As the Supreme Court wrote in *Widmar v. Vincent,*[222] concerning extracurricular clubs in public universities, the general rule against discrimination in access to public facilities might be relaxed if an agency could prove that religious groups were dominating certain facilities in ways that excluded other users. However, proof means evidence of actual domination, not just the agency's fear of possible future domination.

---

[220] 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2640 (1995).
[221] Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994).
[222] 454 U.S. 263 (1981).

School authorities should take care to avoid the appearance of school support for religious groups that meet in school facilities. For example, meetings should be conducted separately from curricular and extracurricular programs and should not be permitted to disrupt official school activities. In one case, a court also suggested that in order to prevent excessive entanglement between schools and religious groups, school boards should not permit a religious group to use a school facility on a permanent basis.[223]

---

[223] Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 117, 389 A.2d 944, 958 (1978); *accord*, Wallace v. Washoe County Sch. Dist., 701 F. Supp. 187 (D. Nev. 1988); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959). In Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994), the Fourth Circuit ruled in favor of a church that had leased school facilities for about ten years during a thirteen-year period. However, the leases were one-year leases that were subject to annual renewal decisions.

APPENDIX I

The Equal Access Act

Short Title

Sec. 801. This title may be cited as "The Equal Access Act."

Denial of Equal Access Prohibited

Sec. 802.

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that–

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof–

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

(c) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or with hold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions

Sec. 803. As used in this title–

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.
(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.
(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Severability

Sec. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other person or circumstances shall not be affected thereby.

Construction

Sec. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

APPENDIX II

BEST COPY AVAILABLE

Statutes Cited

U.S. Const. amend. I/3
20 U.S.C. §§ 4071-4074, Equal Access Act (1984)/13
20 U.S.C. § 4071(c)(2)/15
20 U.S.C. § 4071(c)(3)/15
20 U.S.C. § 4071(c)(5)/15
20 U.S.C. § 4071(d)(1),(3),(4), (6)/16
20 U.S.C. § 4072(2)/15
42 U.S.C.A. § 2000bb-1, Religious Freedom Restoration Act of 1993/4
42 U S.C. § 2000e-2(a)(1), Civil Rights Act of 1964/79
N.C. Gen. Stat. 115C-47(29), 47(29b)/11

Table of Cases

Adler v. Duval County Sch. Bd./29-31
Alfonso v. Fernandez/63
Ambach v. Norwick/47
American Civil Liberties Union of N.J. v. Blackhorse Pike Regional Bd. of Educ./29
Ansonia Bd. of Educ. v. Philbrook/80

Bacon v. Bradley-Bourbonnais High Sch. Dist. No. 307/41
Beck v. McElrath/11
Bell v. Little Axe Indep. Sch. Dist. No. 70/23
Bender v. Williamsport Area Sch. Dist./13
Bennett v. Livermore Unified Sch. Dist./24
Berger v. Rensselaer Cent. Sch. Corp./41
Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico/47
Board of Educ. of Westside Community Sch. v. Mergens/ 14, 17, 28
Brandon v. Board of Educ./12
Brown v. Orange County Bd. of Pub. Instruction/40
Brown v. Woodland Joint Unified Sch. Dist./68

Cantwell v. Connecticut/3
Capital Square Review and Advisory Bd. v. Pinette/6
Cason v. City of Jacksonville/16
Church of God v. Amarillo Indep. Sch. Dist./39
Citizens for Parental Rights v. San Mateo County Bd. of Educ./63
City of Boerne v. Flores/4
Collins v. Chandler Unified Sch. Dist./10
Cooper v. Eugene Sch. Dist. No. 4J/76, 78
Cornelius v. NAACP Legal Defense and Educ. Fund/8
Cornwell v. State Bd. of Educ./63
Country Hills Christian Church v. Unified Sch. Dist. No. 512/ 83, 84
County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter/5, 37

Crockett v. Sorenson/53-56, 62
Crowley v. Smithsonian Inst./62
Curtis v. School Comm. of Falmouth/63

Daniels v. Waters/60
Davis v. Page/64, 65
Doe v. Aldine Indep. Sch. Dist./24, 34
Doe v. Duncanville Indep. Sch. Dist./34, 35
Doe v. Human/54
Doe v. Shenandoah County Sch./48
Duffy v. Las Cruces Pub. Sch./11

Edwards v. Aguillard/59, 61
Edwards v. School Bd./79
Employment Div. v. Smith/4
Engel v. Vitale/6, 9, 10, 42
Epperson v. Arkansas/5, 47, 57, 60, 61, 63

Fairfax Covenant Church v. Fairfax County Sch. Bd./85, 86
Fleischfresser v. Directors of Sch. Dist. No. 200/68
Florey v. Sioux Falls Sch. Dist. 49-5/36, 39, 45, 69

Gaines v. Anderson/11
Garnett v. Renton Sch. Dist. No. 403/17, 22
Gearon v. Loudoun County Sch. Bd./29-31
Gerhardt v. Heid/76
Goetz v. Ansell/45
Goldman v. Weinberger/4
Good News/Good Sports Club v. School Dist. of Ladue/85
Goodwin v. Cross County Sch. Dist./40
Graham v. Central Community Sch. Dist./24
Grattan v. Board of Sch. Comm'rs/41
Grayned v. City of Rockford/8
Gregoire v. Centennial Sch. Dist./84
Grossberg v. Deusebio/24
Grove v. Mead Sch. Dist. No. 354/64-66, 69
Guyer v. School Bd. of Alachua County/38, 39

Hall v. Board of Sch. Comm'rs/53
Hardwick v. Board of Sch. Trustees/64
Harris v. Joint Sch. Dist. No. 241/30
Hedges v. Wauconda Community Unit Sch. Dist. No. 118/42
Hernandez v. Hanson/40
Hishon v. King & Spaulding/80
Hoppock v. Twin Falls Sch. Dist. No. 411/23
Hsu v. Roslyn Union Free Sch. Dist. No. 3/16, 17

Illinois *ex rel.* McCollum v. Board of Educ./47-49, 53, 54, 69

Jaffree v. Wallace/11
Jager v. Douglas County Sch. Dist./33, 35
Johnson v. Huntington Beach Union High Sch. Dist./12
Joki v. Board of Educ. of Schuylerville/37
Jones v. Clear Creek Indep. Sch. Dist./27, 29-31

Karcher v. May/11

Karen B. v. Treen/10
Kent v. Commissioner of Educ./9
Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd./16
Knowlton v. Baumhover/75

Lamb's Chapel v. Center Moriches Union Free Sch. Dist./8, 32, 84, 85
La Rocca v. Board of Educ. of Rye City Sch. Dist./75
Lee v. Weisman/5, 24-27, 29-31, 33-35, 59
Lemon v. Kurtzman/5, 6, 9, 10, 13, 19, 27, 33, 34, 36, 40, 84
Lipp v. Morris/45
Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist./13
Lynch v. Donnelly/5, 6, 36, 37, 69, 71

Malnak v. Yogi/62, 70
Marsh v. Chambers/26, 83
May v. Cooperman/11
May v. Evansville-Vanderburgh Sch. Corp./73
McGlothin v. Jackson Mun. Separate Sch. Dist./77
McGowan v. Maryland/71
McLean v. Arkansas Bd. of Educ./58, 59, 63
Medeiros v. Kiyosaki/63
Meltzer v. Board of Pub. Instruction of Orange County/40
Mergens *ex rel.* Mergens v. Board of Educ./18-22, 30, 34
Mississippi Employment Sec. Comm'n v. McGlothin/77, 78
Mitchell v. McCall/64-66
Moody v. Cronin/64, 66
Moore v. Board of Educ./76
Mozert v. Hawkins County Pub. Sch./64, 66, 67

National Socialist White People's Party v. Ringers/16
Neiderhuber v. Camden County Voc. and Tech. Sch. Dist. Bd. of Educ./79

O'Connor v. Hendrick/76

Palmer v. Board of Educ./61
Passel v. Fort Worth Indep. Sch. Dist./16
Peloza v. Capistrano Unified Sch. Dist./60, 75
Perry Educ. Ass'n v. Perry Local Educators' Ass'n/8
Philbrook v. Ansonia Bd. of Educ./80, 81
Pinsker v. Joint Dist. No. 285/79
Pope v. East Brunswick Bd. of Educ./22

Quappe v. Endry/23

Randall v. Pegan/32, 84
Rankin v. Commission on Professional Competence/79
Rawlings v. Butler/76
Reed v. Van Hoven/12
Resnick v. East Brunswick Township Bd. of Educ./83, 86
Rivera v. East Otero Sch. Dist. R-1/42
Roberts v. Madigan/56, 75
Robinson v. Sacramento City Unified Sch. Dist./16
Rosenberger v. Rector and Visitors of the Univ. of Va./6, 8

School Dist. of Abington Township v. Schempp/3, 6, 9, 10, 36, 42, 47-49, 52, 61, 62
Scopes v. State/57, 60
Settle v. Dickson County Sch. Bd./65
Sherbert v. Verner/3, 4
Sherman v. Consolidated Sch. Dist. 21 of Wheeling Township/45
Shumway v. Albany County Sch. Dist. No. 1/32, 84
Smith v. Board of Sch. Comm'rs of Mobile County/70, 71
Smith v. Ricci/63
Southside Estates Baptist Church v. Board of Trustees/86
Spence v. Bailey/55
State *ex rel.* Johnson v. Boyd /76
Steele v. Van Buren Public Sch. Dist./34, 35
Stein v. Plainwell Community Sch./24
Stone v. Graham/35, 36
Student Coalition for Peace v. Lower Merion Sch. Dist./15

Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist./74
Thomas v. Review Bd./4
Tinker v. Des Moines Indep. Community Sch. Dist. /16
Torcaso v. Watkins/50, 70
Trans World Airlines v. Hardison/79
Trietley v. Board of Educ. /12
Tudor v. Board of Educ./40

United States v. Board of Educ. of Phila./76, 78
United States v. Kokinda/41
United States v. Seeger/62

Vaughn v. Reed/53, 55
Verbena United Methodist Church v. Chilton County Bd. of Educ./32, 84

Wallace v. Jaffree/10, 11
Wallace v. Washoe County Sch. Dist./84, 86
Wangsness v. Watertown Sch. Dist. No. 14-4/79
Ware v. Valley Stream High Sch. Dist./63
Webster v. New Lenox Sch. Dist. No. 122/60, 75
Weist v. Mt. Lebanon Sch. Dist./24
West Virginia Bd. of Educ. v. Barnette/45, 47
Widmar v. Vincent/8, 13, 18, 19, 83, 85
Wiley v. Franklin/49, 51-56
Wisconsin v. Yoder/3
Wood v. Mt. Lebanon Township Sch. Dist./24
Wright v. Houston Indep. Sch. Dist./57, 59, 62, 63

Zellers v. Huff/76
Zorach v. Clauson/48, 61

INDEX

Athletic events, prayer at/33-35

Baccalaureate services/31-33
Bible,
club, (*see* religious clubs)
distribution to students/40,41
study in class/47-62
Books, objections to/40-42, 56, 64-72

Christmas celebrations, (*see* holiday celebrations)
Clothing, objections to/76-78
Clubs, (*see* religious clubs)
Creationism/56-62
Curriculum,
objections to/56-62
religion in/47-62, 64-72
Curriculum-related groups/14, 16, 18-22

Designated public forum/7
Discussion of religion with students/74, 75
Distribution of literature/40-42

Equal Access Act/13-23, 30
Establishment Clause, (*see* First Amendment)
Evolution/56-62
Excusal policy/9, 10, 48, 53, 55, 63-66

Facilities, use by outside groups/83-86
First Amendment,
Establishment Clause/3, 4, 6, 9, 9, 11, 12, 16, 18, 23-26, 36-39, 45, 49-59, 63, 64, 68-74, 83
Free Exercise Clause/3, 6, 23, 39, 45, 50, 55, 63, 64, 68, 72, 76, 79
Free Speech Clause/6, 7, 23, 56, 83
Flag salute/45, 55,
Forums (for speech)/7, 8
Free Exercise Clause, (*see* First Amendment)
Free Speech Clause, (*see* First Amendment)

Graduation prayer/24-33

Halloween celebration/38, 39
Holiday celebrations/39, 40

Instructional materials, objections to/64, 72

Leave for religious reasons,
by personnel/79-81
by students/39, 40
Lemon test/5, 10, 13, 19, 27, 33, 34, 36, 40, 43, 58, 59
Limited public forum/7, 14

Mergens, discussions of/17-22
Moment of silence/10-12
Movies/84

Noncurriculum-related groups/14, 15
Nonpublic forum/7

Personnel, religious activity by,
discussions of religion with students/74, 75
extracurricular student religious clubs/12-24

leave for religious reasons/ 79-81
prayer by/73-74
wearing of religious apparel or symbols/76-78
Pledge of allegiance/45
Prayer,
athletic events/33-35
extracurricular religion clubs for students/12-24
graduation/24-31
moment of silence/10-12
officially sanctioned/9, 10
by personnel/73, 74
private/10
school board meetings/83

Released time/48
Religion courses/47-56
Religion, defined/62
Religion, discussion of with students/74, 75
Religious apparel or symbols worn by personnel/76-78
Religious clubs,
elementary schools/23, 24
Equal Access Act/13-23, 30
Mergens/17-19
secondary schools/19-22
under state constitutions/22, 23
Religious Freedom Restoration Act of 1993/4-7, 55, 64, 66, 68, 79
Religious holidays,
classroom observance/39, 40
leave by personnel/79-81
leave by students/39, 40
Religious literature, student distribution of/40-42
Religious music, performance of/53
Religious symbols,
displays in classroom/35-38
worn by teachers/76-78

School board meetings, prayer at/83
Secular humanism/56-63, 69-71
Sex education/62-64

Teachers,
discussion of religion with students/74, 75
hired to teach religion/48-56
leave for religious reasons/ 79-81
prayer by/73, 74
religion clubs for students/ 12-24
religious apparel or symbols worn by/76-78
Traditional nonpublic forum/7
Traditional public forum/7